

Federal Election Commission

Annual Report 1993



Commissioners

Trevor Potter, Chairman

Danny L. McDonald, Vice Chairman

Joan D. Aikens, Commissioner

Lee Ann Elliott, Commissioner

John Warren McGarry, Commissioner

Scott E. Thomas, Commissioner

Statutory Officers

John C. Surina, Staff Director

Lawrence M. Noble, General Counsel

Lynne A. McFarland, Inspector General

The Annual Report is prepared by the
Information Division.

Louise D. Wides, Assistant Staff Director

Janet Hess, Writer



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

OFFICE OF THE CHAIRMAN

June 1, 1994

The President of the United States
The United States Senate
The United States House of Representatives

Dear Mr. President, Senators and Representatives:

We are pleased to submit for your information the 19th annual report of the Federal Election Commission, pursuant to 2 U.S.C. § 438(a)(9). The Annual Report 1993 describes the activities performed by the Commission in the last calendar year. The report also includes the legislative recommendations the Commission has adopted and transmitted to the President and the Congress for consideration. Most of these have been recommended by the Commission in previous years. It is our belief that these recommendations, if enacted, would assist the Commission in carrying out its responsibilities in a more efficient manner.

This report documents the rapidly increasing demands on Commission resources brought about by record numbers of federal candidates and campaign expenditures. Despite new Commission initiatives to handle filings, audits, and enforcement matters more efficiently, the Commission remains overwhelmed by a growing enforcement case load and by massive amounts of data flowing from record election activity.

Even without any additional responsibilities which would come if new campaign finance legislation were enacted, the Commission remains in urgent need of additional resources. The current system of reporting requirements and contribution prohibitions and limitations, and the resulting audit and enforcement mechanisms required to administer these provisions, are complex. This Annual Report details the Commission's many responsibilities, and identifies those areas where the imbalance between the Commission's resources and the demands on those resources is the most critical.

Respectfully,

A handwritten signature in cursive script, appearing to read "Trevor Potter".

Trevor Potter
Chairman

Table of Contents

| | | | |
|--|-----------|---|-----------|
| Introduction | 1 | Chapter Five | |
| | | Legislative Recommendations | 37 |
| Chapter One | | Public Financing | 37 |
| The Commission | 3 | Registration and Reporting | 41 |
| Commissioners | 3 | Use of Campaign Funds | 46 |
| FEC v. NRA Political Victory Fund: Composition | | Contributions and Expenditures | 46 |
| of FEC Found Unconstitutional | 3 | Compliance | 53 |
| Effects of New Legislation | 4 | Litigation | 57 |
| Other Programs | 5 | Disclaimers | 58 |
| The FEC's Budget | 6 | Public Disclosure | 60 |
| | | Agency Funding | 62 |
| | | Miscellaneous | 62 |
| Chapter Two | | Chapter Six | |
| Administration of the Law | 11 | Campaign Finance Statistics | 65 |
| Enforcement | 11 | | |
| Audits | 12 | Appendices | |
| Public Disclosure | 12 | 1. Biographies of Commissioners | |
| Data Systems Development Division | 13 | and Officers | 73 |
| Press Office | 14 | 2. Chronology of Events | 77 |
| Review of Reports | 15 | 3. FEC Organization Chart | 81 |
| Regulations | 15 | 4. FEC Offices | 83 |
| Advisory Opinions | 16 | 5. Statistics on Commission | |
| Assistance and Outreach | 16 | Operations | 87 |
| National Clearinghouse on | | 6. 1993 Federal Register Notices | 91 |
| Election Administration | 17 | 7. Regulations on Definition of "Member": | |
| | | Summary | 93 |
| Chapter Three | | 8. Regulations Banning Transfers from | |
| Presidential Activity | 19 | Nonfederal Campaigns: Summary | 95 |
| Presidential Election Campaign Fund | 19 | 9. Multicandidate Committee Regulations: | |
| Audits of 1992 Presidential Campaigns | 19 | Summary | 97 |
| Repayments—1988 | 20 | 10. Revised Interim Rules on | |
| Public Funding: Legal Issues | 23 | Ex Parte Communications: Summary | 99 |
| | | 11. "Best Efforts" Regulations: Summary | 101 |
| Chapter Four | | | |
| Legal Issues | 27 | | |
| Constitutionality of the Commission | 27 | | |
| "Best Efforts" | 27 | | |
| Preemption of State Laws | 28 | | |
| Candidate Issues | 30 | | |
| Coordinated Party Expenditures | 31 | | |
| New Multicandidate Committee Rules | 33 | | |
| Corporate/Labor Activity | 33 | | |
| Native American Tribe as a Federal Contractor | 35 | | |
| Procedural Matters | 35 | | |

Introduction

Nineteen-ninety-three was a year of growth, change and redefinition for the Federal Election Commission.

The agency faced an increased workload arising, in part, from monitoring the unprecedented level of federal election activity that took place during 1992. The Commission received increased funding for a small increase in staff and implemented new procedures to handle the growing workload of enforcement matters, including a new prioritization system.

Additionally, in 1993 the Commission began to make greater use of technological advances in all phases of the agency's operations. The agency designed an enhanced disclosure program to afford visitors to the Public Records Office on-line access to reports filed with the Commission for the 1993-94 election cycle, and began to introduce new document retrieval workstations throughout the agency.

An important new responsibility was assigned to the Commission when Congress passed the National Voter Registration Act of 1993. The Commission embarked on an intensive effort to help states implement this new law designed to facilitate and increase voter participation.

The constitutionality of the organization of the Commission itself became a focus of the agency's operations toward the end of 1993. On October 22, the U.S. Court of Appeals for the District of Columbia ruled that the composition of the Commission violated the Constitution's separation of powers. Under the Federal Election Campaign Act (the Act), the President appoints the Commission's six voting members, and Congress designates two nonvoting ex officio members. In *FEC v. NRA Political Victory Fund (NRA)*, the appeals court found that Congress "exceeded its legislative authority when it placed its agents, the Secretary of the Senate and the Clerk of the House of Representatives, on the independent Commission as non-voting ex officio members." After the *NRA* decision, the Commission voted to petition the Supreme Court for a review of the case and initiated a series of actions to ensure the uninterrupted enforcement of the election laws.

The following material documents the Commission's activity during this particularly productive year.

Chapter One

The Commission

Commissioners

During 1993, Scott E. Thomas served as Chairman of the Commission, and Trevor Potter was the Commission's Vice Chairman. On December 15, 1993, the Commission elected Trevor Potter to be its 1994 Chairman and Danny L. McDonald to be Vice Chairman for 1994.

For biographies of the Commissioners, Staff Director, General Counsel and Inspector General, see Appendix 1.

FEC v. NRA Political Victory Fund: Composition of FEC Found Unconstitutional

On October 22, the U.S. Court of Appeals for the District of Columbia ruled that the composition of the Federal Election Commission "violates the Constitution's separation of powers."¹

Under the Federal Election Campaign Act (the Act), the President appoints the Commission's six voting members, and the Secretary of the Senate and the Clerk of the House of Representatives, or their designees, serve as non-voting *ex officio* members. The court found that "Congress exceeded its legislative authority when it placed its agents, the Secretary of the Senate and the Clerk of the House of Representatives, on the independent Commission as non-voting *ex officio* members."

The court rejected the Commission's contention that the *ex officio* members play solely an "informational or advisory role." The court concluded that "advice...implies influence, and Congress must limit the exercise of its influence...to its legislative role." The court added that the "mere presence" of the Congressional representatives "has the potential to influence the other Commissioners." Citing legislative history, the court concluded that Congress intended the *ex officio* members to "serve its interests while serving as commissioners." Ultimately, the court said, "the mere presence of agents of Congress on an

entity with executive powers offends the Constitution."

Based on the severability clause in the Act, 2 U.S.C. §454, the court concluded that "the unconstitutional *ex officio* membership provision can be severed" from the rest of the statute, permitting a reconstituted Commission to continue to operate. The court added that Congress was not, in this instance, required to amend the statute.

The court rejected two other constitutional challenges raised in the case: one regarding the Commission's bipartisan composition and the other, its status as an independent agency. The NRA had argued that:

- The Act's requirement that "[n]o more than 3 members of the Commission...may be affiliated with the same political party," 2 U.S.C. §437c(a)(1) (1988), limited the President's power to nominate under the Appointments clause; and
- The FEC's civil enforcement authority, as an independent agency, unconstitutionally impinged on executive enforcement powers.

The court found the first of these challenges to be nonjusticiable because it was the Senatorial confirmation process, and not the statute itself, that arguably restrained the President. Indeed, the court noted that "without the statute the President could have appointed exactly the same members" to the Commission.

The court also upheld the FEC's status as an independent agency, citing a number of court cases that specifically sanction such entities.

The appeals court ruling reversed a district court decision that the NRA had violated 2 U.S.C. §441b(a) by contributing corporate funds to its separate segregated fund, the NRA Political Victory Fund. (For a summary of that case, see *Annual Report 1992*, p. 28.) Having ruled on the constitutional issue, the appeals court did not consider the merits of the case.

Commission Response

In the wake of the appeals court decision, the Commission undertook a number of steps to ensure the uninterrupted enforcement of the federal election law.

October 26: Reconstitution. Subject to further judicial review, the Commission voted to reconstitute itself

¹ *FEC v. NRA Political Victory Fund*, 6 F.3d 821 (D.C. Cir. 1993).

as a six-member body, comprising only those Commissioners appointed by the President.

November 2: Appeal to Supreme Court. The reconstituted Commission decided to petition the Supreme Court for a writ of certiorari in the case. That decision was consistent with the agency's tradition of defending the constitutionality of the Act. The Commission decided that, in its petition, the FEC would ask the high court to address the separation of powers issue, and—if necessary—to consider its effect on other agency actions.

November 4: Ratification of Regulations, Forms and Advisory Opinions. As a precaution, the Commission voted to ratify its existing regulations and forms, and to adopt a policy statement confirming the efficacy of its advisory opinions.

November 9: Ratification of Audits, MURs and Litigation. The Commission ratified or voted again on its past actions regarding ongoing audits and public financing determinations. It also adopted specific procedures for ratifying its decisions related to ongoing enforcement cases (MURs) and litigation.

Future actions on MURs would depend upon the status of the enforcement matter and the facts of the specific cases:

- For MURs in the investigative stage, the Commission would vote again on the question of reason to believe (RTB);
- For MURs in which the Commission had authorized formal discovery but the respondent had not complied with the subpoena or order, the Commission would vote again on authorizing the subpoena or order;
- For MURs in which the investigation was complete, the Commission would ratify its prior finding of RTB;
- For MURs in which the Commission had found probable cause to believe, it would vote again on that question;
- For MURs in which the Commission was engaged in pre-probable cause conciliation with a respondent, the Commission would vote again on entering conciliation and on the last approved proposed conciliation agreement; and
- For MURs in which the Commission and a respondent were engaged in post-probable cause conciliation, the Commission would take another vote on its

approval of the last proposed conciliation agreement.

- With respect to enforcement litigation, for each case the Commission would vote to ratify its prior actions and to authorize the General Counsel to continue proceeding with the suit.

November 24: Chairman's Letter to Committees, Attorneys and Consultants. Chairman Scott E. Thomas explained the FEC's actions taken after *NRA* to ensure uninterrupted enforcement of federal election law.

Effects of New Legislation

During 1993 Congress enacted two laws that have direct impact on the Commission and the programs the Commission administers. These are discussed below.

FEC Assumes New Duties Under "Motor Voter" Law

Congress assigned significant new duties to the Commission under the National Voter Registration Act of 1993 (NVRA, also sometimes called the "motor voter" law). President Clinton signed the legislation on May 20. The law requires states to implement several voter registration procedures: Registration of individuals applying for driver's licenses; registration by mail; and registration at designated government agencies, specifically, public assistance agencies, state-funded agencies serving persons with disabilities, and armed forces recruitment offices. States must also select additional agencies to provide voter registration services. The Implementation date for the law in most states is January 1, 1995, although the effective date will be extended for certain states whose constitutions will have to be changed.

The FEC is required to provide information to the states about their responsibilities under the law and, in consultation with state officials, to design a national mail-in voter registration form. (A state may also design its own form, but the form must satisfy the criteria set forth in the law.) Additionally, every two years, the Commission must report to Congress on the law's effectiveness and recommend legislative

changes. Finally, the Commission must prescribe regulations necessary to carry out its new responsibilities to develop forms and report to Congress.

The FEC's National Clearinghouse on Election Administration is largely responsible for carrying out the FEC's National Voter Registration Act duties. During 1993, in an intense outreach effort, the Clearinghouse held numerous meetings and conferences around the country to discuss the new law with state officials, and it distributed an NVRA guide for the states. Additionally, the agency published an Advance Notice of Proposed Rulemaking on September 30. Over 60 comments were submitted in response. For more information about the NVRA and the activities of the Clearinghouse, see Chapter Two, Administration of the Law.

Congress Increases Tax Checkoff to \$3

In another action directly affecting the Commission's administration of election laws, Congress increased the Presidential Election Campaign Fund taxpayer checkoff to \$3. The increase—the first since the law was originally enacted—was included in the Omnibus Budget Reconciliation Act, signed by President Clinton on August 10. The checkoff provides funding for the Presidential public funding program, which has provided money in Presidential campaigns since the 1976 elections.

The increase in the taxpayer checkoff from \$1 to \$3 is expected to avert an estimated \$100 million public funding shortage for the 1996 Presidential elections, according to FEC projections. The \$3 deposits will begin in 1994, when taxpayers file their 1993 returns.

Presidential public funds almost ran short in 1992, and that year the Commission predicted that the program would nearly collapse in 1996 unless Congress took action. The new legislation, in effect, adjusts the checkoff amount for inflation since 1973, when the checkoff was first implemented. (For more information, see Chapter Five.)

After the change in the law, the Commission announced that the new legislation should ensure funding for 1996 and at least one additional Presidential election, based on FEC projections. The agency estimated that payments for the 1996 Democratic

and Republican nomination conventions would be \$25.1 million. General election grants were projected at \$125.8 million, leaving sufficient funds available for primary matching fund payments.

(By law, the convention committees receive first priority for public funding payments, then the general election nominees and, lastly, the primary candidates.)

The agency's projections were based on three assumptions:

- Inflation would gradually rise from 3.0 percent in 1993 to 4.5 percent in 1998 and each year thereafter.
- Checkoff participation would continue to decline and then level off.
- Matching fund demand represented an average of payments made in 1988 (an unusually expensive campaign cycle) and 1992 (an unusually inexpensive campaign cycle), adjusted for inflation.

The rate of inflation is especially critical in determining how long the \$3 tax checkoff will allow the Fund to remain solvent. For example, an inflation rate of 4 percent or less in future years would likely permit full funding of Presidential elections through the year 2004. Ultimately, however, public funding payouts, indexed to inflation as they are, will outpace deposits to the Fund, causing a shortfall.

With respect to taxpayer participation, the Budget Reconciliation Act will initially shrink the pool of possible participants by raising the income threshold at which families incur tax liability. (Those who have no tax liability cannot allocate money to the Fund by checking "yes" on their federal tax returns.) It is unknown whether taxpayer participation will be affected by the increased value of the checkoff.

For a more comprehensive discussion of the tax checkoff and Presidential public funding, consult the FEC report, released in April 1993, *The Presidential Public Funding Program*.

Other Programs

Ethics

During 1993, the Commission's ethics staff worked to implement new government-wide standards of conduct prepared by the Office of Government Ethics and the Office of Personnel Management.

In another development, senior FEC staff members and procurement officials began filing confidential disclosure reports on their personal finances, as required by the Ethics in Government Act of 1978, as amended. The staff reports were filed with the General Counsel, who also serves as Designated Agency Ethics Official (DAEO). To keep current with the new ethics-related duties, the DAEO designated a staff member to serve as full-time deputy ethics official.

Management Issues

During 1993, the Chairman appointed a top-level committee, comprising the Staff Director, General Counsel, Deputy Staff Director and Director of Personnel, to evaluate the applicability to Commission operations of various proposals emanating from the Vice President's National Performance Review. On the committee's recommendation, the Commission voluntarily reduced the number of internal agency directives in response to a nonbinding executive order. On the other hand, the Commission demurred on another executive order on staffing levels. The Commission took the position that in this period of burgeoning campaign finance activity, the agency could not reduce its requested staffing levels and continue to meet its obligation to administer and enforce the campaign finance laws.

As reported in *Annual Report 1992*, the Commission's Office of General Counsel introduced a Total Quality Management (TQM) program during 1992. During 1993, the TQM program became part of union/management negotiations over a new Labor/Management Agreement. No agreement on the matter could be reached, and the TQM program was suspended.

Equal Employment Opportunity Program

The EEO Director manages the EEO Program, including the Federal Women's Program and special emphasis programs for minorities. Each year the director submits, to the EEOC, statistical reports on discrimination complaint processing and the Commission's workforce. In addition, the director files, with the Office of Personnel and Management, status reports on the Disabled Veterans Affirmative Action Plan.

During 1993, the Office of EEO Programs (OEEOP) embarked on the development of an alter-

native dispute resolution program and a career advancement program. It revised the Commission's instructions for the complaint process and began updating the affirmative employment program for minorities and women. The OEEOP sponsored programs for Black History Month and for National Disability Employment Awareness Month. The OEEOP also participated in the orientation program for new employees and cosponsored, with the Personnel Office, in-house training for supervisors. The OEEOP published a quarterly newsletter, *EEO Focus*, for Commission staff, provided counseling for those with equal employment concerns and sponsored a workshop on sexual harassment prevention for new employees.

The EEO Advisory Committee, whose charter was approved in October, made recommendations for a career advancement program and cosponsored mammogram screening and crime prevention programs with the Personnel Office.

Inspector General

The Commission's Office of Inspector General (OIG) is authorized, under the Inspector General Act, to conduct audits and investigations to detect waste, fraud and abuse. During 1993 the OIG audited several components of the Commission's operations. The Commission implemented a practice whereby the chairman of the agency would act as audit follow-up official. Management resolved all outstanding OIG audit recommendations as of the last OIG reporting period. The OIG also participated in the orientation program for new employees to ensure that staff are aware of the duties and responsibilities of the OIG.

The FEC's Budget

Fiscal Year 1994

On April 22, FEC Vice Chairman Trevor Potter, as Chairman of the Finance Committee, testified before the Senate Committee on Rules and Administration, emphasizing the need for a \$2.6 million increase in the FEC's funding for the 1994 fiscal year (beginning on October 1, 1993). "[T]he Commission is currently overwhelmed by a rapidly growing enforcement case load and by the wave of data flowing from the 1992

elections,” he stated. “This is despite the fact that a very lean FEC staff has been working furiously throughout the 1992 cycle....”

The \$2.6 million increase would bring the agency's budget to \$23.6 million, with 320 full-time equivalent (FTE) employees.

The Vice Chairman pointed out that campaign finance activity jumped to almost \$2 billion in the 1992 election cycle. This resulted in more—and longer—committee reports than in previous election cycles. Consequently, more staff time had been needed to review the reports and enter data from them. The enforcement workload, too, had demanded more resources due to the increasing complexity of the cases and the growing number of respondents over the past four years.

He also said that the passage of the “motor voter” law placed further strains on the agency, and noted that Congress was also considering major changes in the federal election laws. Even without new legislation, however, the agency anticipated an extremely heavy workload for the 1994 election cycle.

Concluding his testimony, Mr. Potter stressed that “there is no point in keeping campaign finance laws on the books, certainly not in adding to them, if we cannot administer and enforce them in a timely manner. If Congress and the President are serious about wanting us to do the job, then we ask that we be given the tools.”

On November 18, the Commission approved the FY 1994 Revised Management Plan for its \$23,564,000 appropriation. Under the plan, the Commission expected to enter FY 1995 at a staffing level of approximately 320 FTE positions.¹ By contrast, the Commission received an appropriation of \$21,031,000 and 276 FTE for FY 1993.

¹ Although the Commission was authorized 320 FTE for FY 1994, the appropriation received did not include the funds to cover the January 1994 government-wide locality pay adjustment, which effectively reduced staffing by almost 19 positions.

Fiscal Year 1995: Request for Program Enhancements

On October 1, 1993, the Commission sent OMB and Congress a budget request for \$29.8 million and 347 FTE for fiscal year 1995. The document asked for \$6.3 million more than the anticipated FY 1994 appropriation. The increase would be used primarily to pay for the following programs:

- Electronic filing of campaign finance reports submitted to the FEC and enhancement of the agency's computer equipment and capability. The program would cost nearly \$4 million and require 7 additional staff for FY 1995.
- The 1996 Presidential funding program. Additional auditors would replace GAO auditors who, during previous Presidential cycles, had been detailed to the FEC on a nonreimbursable basis.
- Audits of 20 to 25 political committees. This program, to be carried out under 2 U.S.C. §438(b), would ensure that committees with the most egregious reporting problems would be audited, and would be subject to enforcement action, even in Presidential election years. (All publicly funded committees and host committees would continue to be audited, as well.)
- Enforcement of the \$25,000 annual limit on contributions from individuals. Rather than relying on outside sources to generate examples of apparent violations, the Commission would rely on its own resources to initiate enforcement cases. At a cost of \$238,600, the program would need 4 additional staff.

If the electronic filing program were fully funded, the Commission would begin to implement it in time for the 1996 elections. It would be available for the national party committees and large PACs, which file reports with the FEC. (House and Senate committees, which file with the Clerk of the House and the Secretary of the Senate, respectively, would not be included in this program.) Under this proposal, the Commission would begin to develop a program whereby smaller PACs and party committees could file data by magnetic disk. In addition, the FEC would develop software specifications for those committees that wanted to file computer-generated paper copies of FEC reports.

The request for funds to implement electronic filing came in response to suggestions from Congressional oversight committees. While acknowledging that the system should increase the breadth and scope of data collected (e.g., more detailed disbursement data) and reduce the time required to capture the data, the Commission made clear that the program would be expensive, particularly during development and installation. Furthermore, if the agency chose to maintain a consistent data base (i.e., capture from hard copy filers the same types of expenditure data that would be available from electronic filers), FEC staff would have to manually capture more data from reports filed on paper.

Commenting on the budget submission, the Commission's request stated that "with the fate of proposed campaign finance reform legislation in doubt, it is even more imperative that the Commission receive adequate funds to vigorously enforce the existing laws and promote the widest possible disclosure of campaign finance data."

Fiscal Year 1995: Revised Request

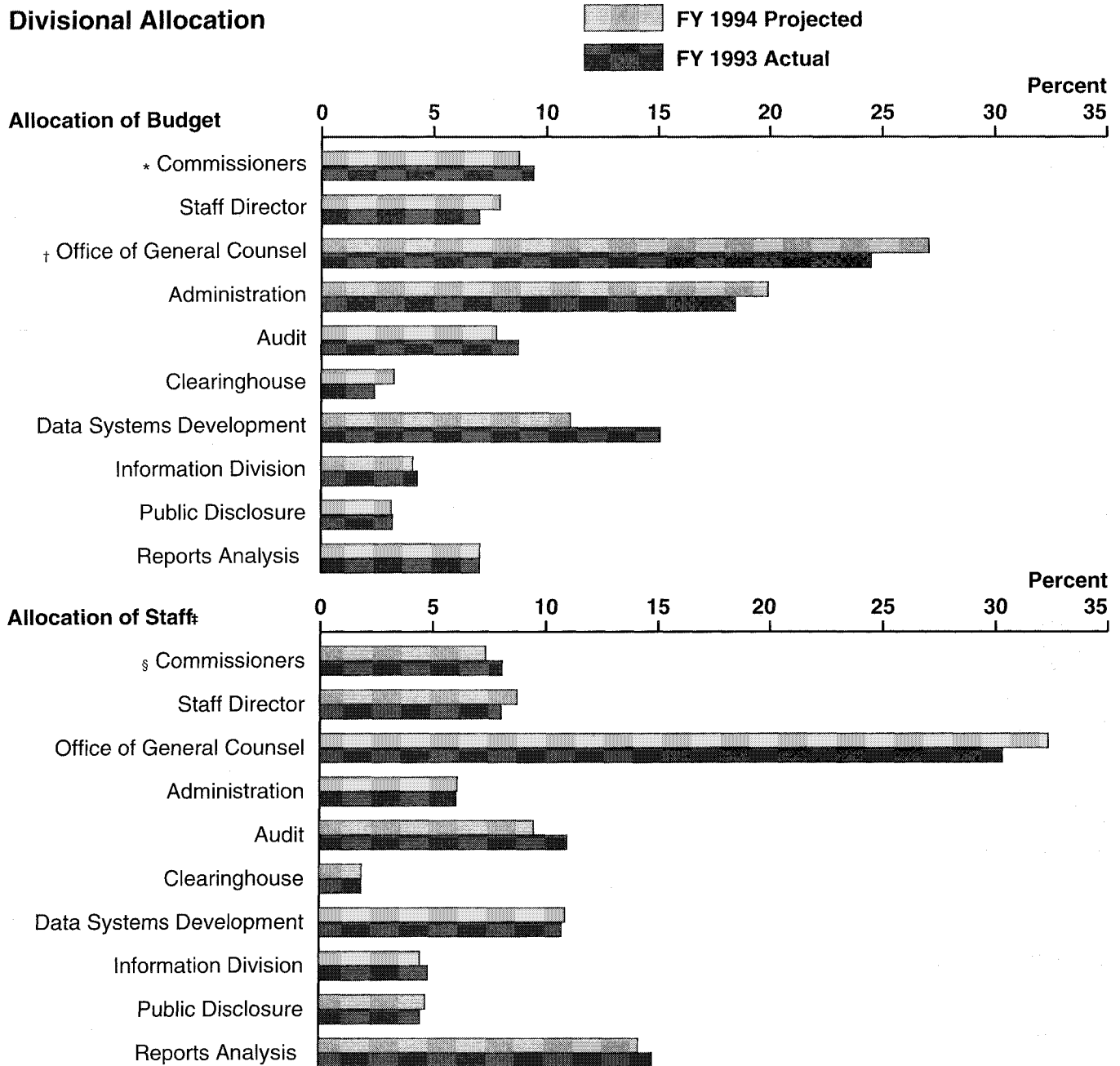
In a December 9 letter to Leon E. Panetta, Director of the Office of Management and Budget, FEC Chairman Scott E. Thomas formally submitted an adjustment to the agency's FY 1995 Budget Request, raising the full request to \$31,793,000 for 347 FTE. The adjustment reflected increases in locality pay and employee cost-of-living adjustments, as well as changes in the grade and position structure of the Commission subsequent to the submission of the original Budget Request.

In his letter, the Chairman noted that the Commission "has received strong Congressional support from our oversight and appropriation committees to seek some major computerization initiatives for the 1996 elections, as included in our FY 1995 Budget Request. Given that both Houses of Congress have passed campaign finance legislation, and that the Clinton Administration has repeatedly stated that campaign finance reform remains a priority, it is imperative that the Federal Election Commission receive the full funding for the 347 FTE requested in FY 1995."

Functional Allocation of Budget

| | FY 1993 | FY 1994 |
|-------------------------|----------------|----------------|
| Personnel | \$14,742,900 | \$17,068,000 |
| Travel | 384,100 | 382,000 |
| Motor Pool | 6,700 | 12,000 |
| GSA Space | 2,070,500 | 2,333,000 |
| Commercial Space | 24,900 | 26,500 |
| Equipment Rental | 374,400 | 450,000 |
| Printing | 352,200 | 392,500 |
| Training | 66,100 | 126,000 |
| Administrative Expenses | 264,600 | 341,000 |
| Support Contracts | 724,200 | 829,000 |
| Supplies and Materials | 320,900 | 297,500 |
| Publications | 215,300 | 237,000 |
| Telephone/Telegraph | 245,500 | 277,500 |
| Postage | 198,000 | 250,000 |
| GSA Services, Other | 141,200 | 194,000 |
| Equipment Purchases | 996,300 | 348,000 |
| Total | \$21,127,800 | \$23,564,000 |

Divisional Allocation



* Includes Inspector General's office and Representational Fund.

† The Commission's budget for the Office of General Counsel includes these functions (listed in alphabetical order): administrative law, advisory opinions, enforcement, ethics, litigation, Presidential public financing, regulations and special projects.

‡ The Commission averaged 270.1 full-time equivalent positions (FTE) in FY 1993 and projected 301 for FY 1994. See page 7.

§ Includes Inspector General's office.

Chapter Two

Administration of the Law

The Federal Election Commission is the independent regulatory agency with sole authority for the administration and civil enforcement of the Federal Election Campaign Act (the Act). This chapter discusses the Commission's efforts to fulfill its mission during 1993.

Enforcement

As 1993 opened, the Commission faced a substantial backlog of enforcement cases because Commission resources had not kept pace with an increase in the complexity of the cases themselves, a three-fold increase in respondents since 1988 and the explosion of campaign finance activity. In the 1992 election cycle, the Commission regulated the activities of over 9,000 political committees that spent \$2 billion, a \$500 million increase over the last Presidential election cycle. Moreover, in the past four election cycles, the Commission handled 1,997 cases involving several thousand respondents. As of December 1, 1993, the FEC's docket contained 448 cases involving approximately 2,300 respondents.

Prioritization System

During 1993, the Commission ushered in substantial enforcement reform by implementing a comprehensive prioritization system designed to produce timely resolution of significant cases. The prioritization system had been under development in the Commission's Office of General Counsel for some time. (See *Annual Report 1991*, p. 23.)

In a news conference of December 13, 1993, announcing the new enforcement measures, Chairman Scott E. Thomas observed, "While the new enforcement measures I am announcing today include several procedural and administrative changes, the foremost difference—and the most important for the regulated community and public to understand—is that the FEC has adopted a sweeping, new approach to enforcing election law."

Specific elements of the new priority system included the following:

- Using objective criteria to rank cases to identify those best warranting the use of the agency's limited resources;

- Determining the total number of cases that enforcement staff could efficiently pursue at one time;
- Establishing realistic time goals for resolving targeted cases and specifically trying to resolve cases within an election cycle;
- Managing cases through periodic evaluations; and
- Creating a central enforcement docket system to process incoming cases.

As part of the prioritization process, the Commission voted on December 9 to take no further action on 137 enforcement cases and 9 enforcement referrals from its Reports Analysis Division. The closed cases fell into two broad categories: those which were relatively insignificant compared with other pending cases and those that were stale, meaning the activity occurred prior to the 1990 election cycle.

In explaining the Commission's action, Chairman Scott E. Thomas said that the agency "cannot, and should not, attempt to fully investigate and resolve each and every one of the hundreds of cases that come before [it]. Law enforcement agencies at every level of government often use their prosecutorial discretion in selecting the cases they can prosecute."

Among the factors the Commission uses to prioritize cases are: the presence of knowing and willful intent; the apparent impact the alleged violation had on the electoral process; the amount of money involved; the age and timing of the violation; and whether a particular legal area needs special attention.

While prioritization will mean that the Commission does not pursue some cases, Chairman Thomas explained that the system "will better enable the FEC to work on a wide range of cases at all times." He cautioned, "No one should assume that any particular type of violation will be overlooked."

During 1993 the Commission also moved toward assessing higher civil penalties when serious violations of the law were found. During the year, one case involved civil penalties of nearly \$123,000.

"If paying civil penalties was considered simply the cost of doing business in the past, that will change," Chairman Thomas noted.

Violations of the \$25,000 Annual Contribution Limit

As part of the Commission's enforcement efforts in 1993, the agency imposed significant penalties on individuals who had exceeded the \$25,000 annual limit on contributions to federal committees.

Under federal law, an individual's total contributions to influence federal elections may not exceed \$25,000 in one calendar year. At the direction of the Commissioners, the General Counsel launched an investigation into possible violations of the \$25,000 limit, two days after an April 1990 Los Angeles Times article reported that several individuals had exceeded the limit during the 1988 election cycle. Concluding the investigation into these matters and a related case, the Commission announced on March 17 that ten individuals agreed to pay \$64,000 in civil penalties for violating the \$25,000 annual limit on contributions and for other violations of the contribution limits. Most of the violations took place in 1988. The civil penalties were included in conciliation agreements signed by the individuals. The agreements included admissions of the violations, and noted when refunds had been obtained by the contributors.

FEC Chairman Scott E. Thomas commented: "The message from this case is that the FEC does enforce contribution limits. Those making political contributions should be knowledgeable of the limits enacted by Congress."

The Commission's budget request for FY 1995 asked for an additional \$238,600 for a program to enable the FEC to identify individuals who have exceeded the \$25,000 annual limit and to pursue appropriate enforcement action against them.

Audits

Because the statute requires the Commission to give priority to the mandatory audits of publicly funded Presidential candidates and committees, almost all of the Audit Division's resources during 1993 were devoted to reviews of those 17 committees from 1992 (including fieldwork and drafting of interim audits). However, the Commission was also able to begin audits of 8 House and Senate candidates on a "for-cause" basis.

In addition, a number of new audit procedures were implemented which allowed for more effective use of the Division's resources and expedited the release of audit reports. Most notable is the release of final audit reports in their entirety and the inclusion of an executive summary which provides a summary of the findings in the report.

For more information about these new procedures and other Audit activities, see Chapter Four, Presidential Activity.

Public Disclosure

The disclosure of campaign finance information has been an essential part of the FEC's mission since the agency's beginnings. This year saw a number of changes in the FEC's public disclosure program, many of them designed to take greater advantage of improved technology.

Public Records

Under the Act, campaign reports filed by federal committees must be available for inspection in the agency's Public Records Office within 48 hours of their receipt. Interested persons visit the Public Records Office to review these reports and computer printouts, monitoring the sources of funds and spending patterns or looking for possible errors and violations of the law.

In 1993, the Public Records Office, working closely with the Commission's Data Services Division, moved further down the road to implementing a computerized imaging system to replace the older microfilm system for processing and retrieving material filed with the agency. By the end of 1993, the processing branch in the Public Records Office had scanned the entire database of 1993-94 reports filed with the Commission.

Initially, the imaging system would function much like the microfilm system it replaced, allowing the user to enter an image number and retrieve a specific page of a report filed by a given committee. By year's end, equipment was being installed to permit such retrieval at new, computerized workstations in the Public Records Office. The individual would be able to

copy a report, or part of a report, using a laser printer at the workstation.

Later in the 1993-94 cycle, the Commission's disclosure database and imaging system will be integrated. The integrated retrieval system will feature a graphical user interface, permitting an individual to obtain information using simple "point and click" commands with a mouse (no longer needing, for example, an image number to retrieve information).

To expedite the processing of reports in 1993, the processing branch in Public Records added a night shift for the first time. The experimental second shift provided the agency with a 16-hour day for processing documents.

The Public Records Office also implemented a fax service under which, for example, a subscriber could place a standing order to receive copies of all items on the agenda of a Commission meeting when those documents became public, or copies of all advisory opinions as they were issued.

In addition, during 1993 the office bought a "flash fax" system. This technology will permit callers to call a special Commission number, review a menu of documents, and, using a touch-tone phone, place an order for documents to be faxed to them in a return call. The office also developed a new brochure for visitors to the Public Records Office, setting out a checklist of the office's resources available to researchers.

The Public Records Office participated in numerous classes for reporters during 1993 and, with a representative from the Data Systems Division, took part in a three-day conference for investigative reporters on the use of computers in reporting.

Finally, during 1993 the Public Records Office received approval to begin taking payment for documents by credit card, rather than requiring individuals to make pre-payments for document orders or establish accounts with the office. The office estimates that the credit card option will reduce the time for processing orders from outside the Washington, D.C., area by 50 percent.

Data Systems Development Division

In 1993, Data Systems began implementing the FEC's electronic imaging system in the Reports Analysis Division (RAD) and in the Public Records office. Completion of the first phase of the project, which includes the imaging and retrieval of financial documents filed at the FEC, is projected for July 1994. The Document Imaging System (DIS) replaces microfilm reader stations with a computer application that permits a user to view a document (such as a committee's report) on a high resolution computer screen, just as the document appeared in its original form. The DIS provides users with the ability to view and print reports filed at the FEC during the 1993-1994 election cycle.

During 1993, Data Systems also worked with the Reports Analysis Division and the Audit Division as those divisions joined the Commission's computer network. With the installation of desk top computer capabilities in RAD and Audit, all offices in the Commission will have desk top computing capabilities. This will complete a five year project.¹

As a result of a competitive procurement process, a new contractor began providing computer services to the Commission in October 1993. The contract tripled the computing power, doubled the storage capacity to 12 gigabytes (12 billion characters), and increased the communications capability thirteen times over the previous ADP contract. The monthly cost to the FEC decreased by \$500.

During the past year, the Commission processed 41,000 documents, or 10,000 documents more than during a comparable period in 1991. These documents represented 682,000 transactions. Compared with a similar off-election year in 1991, 1993 saw a 129 percent increase in the number of transactions entered and verified. This increase was, in part, because of the unusually high number of amendments filed with the Commission, as committees corrected the reports that detailed the record \$2 billion spent in the 1992 election cycle.

¹ Installation of desktop computing capabilities in RAD and Audit was completed in March 1994.

In 1993, Data continued its work with the Direct Access Program (DAP). Under DAP, users have direct, on-line access to the Commission's database. Users of DAP pay an hourly rate for the service. Under the new contract, the Commission was able to reduce the hourly rate charged for DAP by 20%. Of the 300 accounts using DAP at any time, most were continuing subscribers (accounts that are not using the system for the first time). Among the heaviest users of the system were newspapers, journalism schools, and other interested organizations. Law firms were especially active as new subscribers to DAP during 1993. About 575 organizations have subscribed to DAP since the program began in 1985. Forty-four percent more time was used by DAP subscribers in 1993 than had been used in 1991, the last

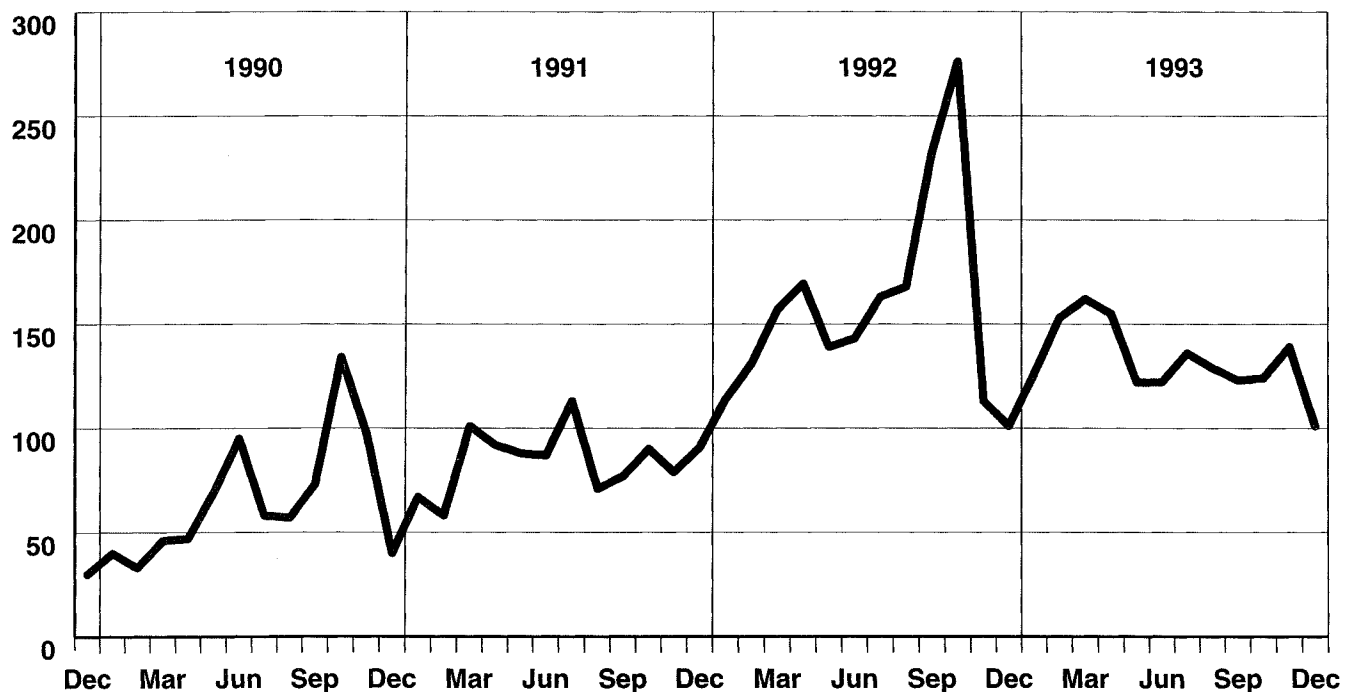
non-election year. In 1993, usage totaled 1592 hours (valued at \$37,980), and 116 new DAP accounts were added, a 41 percent increase over 1991.

Press Office

For the Commission's Press Office, 1993 was the busiest nonelection year in the agency's history. The year saw a significant increase in phone calls, press releases and visitors to the Press Office. The office also fielded an especially high number of requests under the Freedom of Information Act. Both major metropolitan outlets and smaller newspapers took greater advantage of the Commission's Direct Access Program. The Press Office also increased its staff in 1993 in anticipation of expanding its outreach.

Direct Access Usage by Month 1990 through 1993

Hours



On December 13, the Commission held a press conference to announce substantial reform of its enforcement program. The Press Office scheduled the announcement at the National Press Club and provided extensive material to reporters covering the conference.

Review of Reports

Reports analysts review each report filed with the Commission to ensure total disclosure of campaign finance information and compliance with the Act and the Commission's regulations. If an examination of a report suggests that a committee may have violated the law, the reports analyst sends the committee a letter (called a request for additional information, or RFAI). The letter provides a vehicle for filers to correct errors and omissions on their reports or to explain the possible violations. Serious violations are referred to the Commission's Office of General Counsel or Audit Division for appropriate action.

In 1993, the Reports Analysis Division processed 326 administrative terminations of political committees. The Act and the FEC regulations (at 11 CFR. 102.4) provide that the Commission may administratively terminate a political committee's reporting obligation in certain specified circumstances. Most of the committees that were subject to administrative termination in 1993 were old committees, many of which had for years been filing reports that simply disclosed outstanding debts from previous election cycles. The 1993 administrative terminations represented the first mass administrative terminations by the Commission in ten years. During the year, the agency also received 30 debt settlement plans from political committees and closed 20 debt settlements.

The extraordinary level of activity during the 1992 election cycle resulted in a backlog of reports, despite the fact that the productivity of reports analysts had actually increased. To help avoid future backlogs, the agency planned to install computer workstations for every analyst and authorized the addition of new staff to handle the ever increasing workload.

Regulations

In 1993, the Commission adopted new regulations in five areas, as follows:

- Transfers from a candidate's nonfederal to federal campaign;
- The definition of "member" and "membership association";
- Disclosure of multicandidate committee status;
- Best efforts to obtain and report information about contributors;² and
- Interim ex parte regulations.

The first four subjects are discussed in Chapter Five, Legal Issues, and summarized in the appendices. The rules on ex parte communications are discussed below and summarized in the appendices as well.

In 1993, the Commission also began other rulemaking proceedings in five different areas:

- Enforcement regulations that would revise or clarify almost every aspect of the enforcement process, from the initial filing of a complaint to the payment of penalties;
- Regulations on the personal use of campaign funds, which would prohibit a campaign committee from paying a salary to the candidate or paying any expense that would exist regardless of the campaign;
- A proposal to permit the use of a candidate's name in the title of a fundraising project opposing the candidate;
- Revised regulations on the public funding of Presidential nominating conventions; and
- Regulations to implement the Commission's new responsibilities, under the National Voter Registration Act, to develop a national mail-in voter registration form and to file biennial reports to Congress.

Revised Interim Ex Parte Rules

On October 28, the Commission adopted revised interim rules on ex parte communications that reflected public comments and testimony, and its own experience with the previous interim rules. (Ex parte communications are written and oral communications made by persons outside the agency to Commission-

² These regulations were submitted to Congress in October 1993 and became effective on March 3, 1994.

ers or their staff concerning substantive Commission action.) The revised rules, which took effect November 10, replaced those adopted in December 1992.

The amended rules extended the ban on ex parte communications regarding audits and litigation to those concerning public funding determinations, and specified how Commissioners and their staff must report attempted prohibited communications. The revised rules continue to permit ex parte communications related to rulemaking proceedings and advisory opinions; the recipient Commissioner or staff member, however, must disclose the contact within three business days or before the Commission's next consideration of the matter, whichever occurs first. Such communications become part of the public record.

Other Regulations

During 1993, the Commission continued its analysis of issues involving corporate and labor communications. It also analyzed issues in a number of other areas of its regulations, including disclaimer notices, recordkeeping and reporting, coordinated party expenditures and the allocation of travel expenses.

In addition, the Commission created a task force to evaluate the efficacy of the agency's rules for allocating shared federal/nonfederal expenses (the "soft money" rules). After reviewing the findings of the task force, the Commission will consider whether to amend the allocation regulations after the 1994 election cycle.

Advisory Opinions

Advisory opinions clarify the election law for the person who requests an advisory opinion and for anyone else in the same situation as the requester. The Commission discusses and votes on advisory opinions in public meetings. The Commission issued 25 advisory opinions in 1993. It is notable that in 1993, for the first time in the FEC's AO history, there were no advisory opinion requests withdrawn, no AO deadlocks, and no advisory opinion requests closed without issuance of an opinion.

Selected advisory opinions issued during 1993 are included in the discussion of legal issues, Chapter Four.

Assistance and Outreach

The Commission has, since its beginning, encouraged voluntary compliance with the law by offering information, advice and clarification to those seeking help. Some of the activities undertaken by the agency during 1993 are discussed below.

Telephone Assistance

The agency's toll-free information line, 800-424-9530, is central to the Commission's outreach program. Individuals throughout the country can speak anonymously with staff in the Information Division, who provide information on the law. Public affairs specialists answer thousands of questions each year, often researching relevant advisory opinions and litigation for callers. During 1993, the office handled 72,704 calls.

Reporting Assistance

Reports analysts, who are knowledgeable about complex questions of reporting and related compliance matters, are available to discuss reporting problems or questions with political committees. Any committee with reporting questions may call the Commission and speak directly to the analyst assigned to review the committee's reports.

The agency sends each committee treasurer a reminder of upcoming reporting deadlines three weeks before the due date of a report. In addition, *The Record*, the FEC's monthly newsletter, publishes reporting schedules and requirements.

Publications

In 1993 the Commission's Information Division published *The Presidential Public Funding Program*, a comprehensive study covering the history, achievements and problems associated with the public financing of Presidential elections. The study presented many of the arguments made for and against the program and also discussed the long-standing concern about a funding shortfall for the 1996 Presidential elections. (The report was published before the \$3 checkoff was enacted; see Chapter One.)

The report also addressed other policy matters, including the use of soft money and private money in Presidential elections, the requirements that candi-

dates must meet to qualify for public funding, the spending ceilings for primary candidates, and the audit and enforcement process.

The Public Records Office published a new edition of *Pacronyms*, an alphabetical list of acronyms, abbreviations and common names of political action committees (PACs). The Commission also published the *Combined Federal/State Disclosure Directory 1993* and *Federal Elections 92*. In 1993, the agency published a revised brochure explaining the Direct Access Program (DAP), which provides on-line access to campaign finance information, advisory opinions and court case abstracts.

In 1993, the Commission's monthly newsletter, the *Record*, was redesigned. The new *Record* and all other publications and brochures benefited from the Information Division's new desktop publishing capability.

The Commission published a new edition of the *Campaign Guide for Congressional Candidates and Committees*. Additionally, the agency released *Local Party Activity*, a completely revised publication to explain federal campaign finance rules for "local party organizations"—that is, party committees below the state level that have not registered as federal "political committees." The Commission also published *The \$3 Tax Checkoff* to inform citizens about the Presidential Election Campaign Fund, financed by the \$3 checkoff on individuals' tax forms. *Selected Court Case Abstracts* was updated, as was the compilation of *Explanations and Justifications*, materials which accompany agency regulations.

In 1993, the Commission won awards for two 1992 publications, taking honorable mention Blue Pencil Awards for the brochure *The FEC and the Federal Campaign Finance Law* and the *Campaign Guide for Corporations and Labor Organizations*.³

Conferences and Visits

The Commission's first conference on campaign finance law for the 1994 cycle took place in San Francisco on September 30 and October 1, 1993. The

regional conference offered workshops for candidate committees, party committees, and corporate and labor PACs and their connected organizations. Representatives of the Internal Revenue Service and the California Fair Political Practices Commission attended and answered questions from the audience. On December 13 and 14, the FEC held a conference in Washington, DC, for corporations, labor organizations, trade associations and their PACs. More than 400 people attended these conferences.

FEC staff held informal meetings in five state capitals as part of the Commission's State Outreach Program. They visited Harrisburg, Hartford, Indianapolis, Lincoln and Helena to meet with candidates, campaign staff and staff members of party committees and PACs.

National Clearinghouse on Election Administration

National Voter Registration Act of 1993

The Clearinghouse efforts during 1993 focused on assisting the states in the implementation of the National Voter Registration Act of 1993 (NVRA).

Congress adopted the NVRA to facilitate voter registration and to increase the number of eligible citizens who register to vote in elections for federal office. To this end, the law provides citizens with opportunities to register to vote:

- At state-funded offices that provide services to persons with disabilities;
- At state offices that issue driver's licenses;
- At state offices that provide public assistance;
- At other state-designated offices;
- At armed forces recruitment offices; and
- Via a national mail voter registration form.

In addition, the NVRA mandates specific maintenance procedures for voter registration files and provides certain fail-safe voting procedures to protect an individual's right to vote.

The Commission has four responsibilities under the NVRA:

- To provide information to the states with regard to their responsibilities under the NVRA;
- To develop a national mail voter registration application form for federal elections;

³The Blue Pencil Awards are given annually by the National Association of Government Communicators.

- To submit biennial reports to Congress assessing the impact of the NVRA on the administration of federal elections; and
- To prescribe regulations necessary for the development of the mail registration application and the report to Congress.

Pursuant to these responsibilities, the Clearinghouse convened an ad hoc discussion group in June to begin substantive consideration of the requirements of the NVRA, the range of options available to the states under the NVRA, and the roles of the affected federal agencies. The group comprised representatives from various federal agencies, election officials from around the nation, representatives of associations of public officials, and representatives of various public interest groups from the National Motor Voter Coalition.

The Clearinghouse staff divided the summer months between making presentations on the NVRA before groups of election officials, state legislators and local government officials around the nation, and writing a guide for the states entitled *Implementing the National Voter Registration Act of 1993: Requirements, Issues, Approaches, and Examples*. This document is available free from the Clearinghouse.

In September and October, the Clearinghouse held a series of five regional conferences in Seattle, Dallas, Chicago, Boston and Atlanta. The conferences provided a forum for a more thorough discussion of the NVRA among key officials from the states. The conferences also assisted state legislators preparing to enact the measures necessary to ensure compliance with the law by the implementation date, which, for most states, is January 1, 1995.

Publications

Election Directory. This directory contains an updated list of the names and addresses of state election officials, and the addresses of local election officials responsible for canceling prior voter registrations.

Polling Place Accessibility in the 1992 General Election. This is the fourth progress report issued by the Commission under the Voting Accessibility for the Elderly and Handicapped Act of 1984. Under that Act, the FEC must issue one more report, covering the 1994 elections. The FEC is responsible for conducting surveys on accessibility, compiling the results, and reporting these results to Congress.

Election Case Law '93. This publication contains an overview of the laws governing elections as applied by state and federal appellate courts. Each chapter addresses a separate issue, beginning with a comprehensive summary of the current state of the law, followed by summaries of leading court cases. Each chapter also contains synopses of other selected cases and a bibliography of legal literature.

Education

During 1993, the Clearinghouse received a detailed analysis of the training and educational needs of local election officials. This study was the first step in a multiyear project to develop training videos and handbooks focusing on various aspects of election administration. The ultimate goal of the project is to provide state and local election officials with a vehicle for conducting comprehensive training seminars.

Chapter Three Presidential Activity

By increasing the taxpayer checkoff from \$1 to \$3, in 1993 Congress ensured that the Presidential public funding system would remain solvent for the immediate future.

With the continuance of the public funding system assured, the Commission focused its efforts on enhancing the timeliness of its audits in the wake of the unprecedented activity of the 1992 elections. This chapter reports on those efforts.

Presidential Election Campaign Fund

Public funding has been a key part of our Presidential election system since 1976. Using the dollars checked off by taxpayers on their federal income tax returns, the federal government provides matching funds to qualified candidates for their primary campaigns, funding to major parties for Presidential nominating conventions, and grants to Presidential nominees for their general election campaigns.

Beginning in 1988, the Commission predicted a shortfall in the Presidential Election Campaign Fund. The Commission testified that a shortfall was inevitable because of a fatal flaw in the public funding program: payments from the Fund were indexed to inflation, but the \$1 tax checkoff that financed the system was not. The Fund was also affected by a gradual decline in taxpayer participation in the checkoff program.

Then, in 1993, Congress enacted the Omnibus Budget Reconciliation Act, which included a provision increasing the checkoff from \$1 to \$3. The change had the effect of adjusting the checkoff amount for inflation since 1973, when the checkoff was first implemented. The increase in the checkoff averted an estimated \$100 million public funding shortage for the 1996 Presidential elections. Deposits to the Presidential Election Campaign Fund started increasing in 1994, when taxpayers filed their 1993 returns.

(For more information about the Fund, see Chapter One, The Commission.)

Audits of 1992 Presidential Campaigns

Changes in Procedures

The law requires the Commission to audit all Presidential candidates and convention committees receiving federal funds to ensure that the funds are not misused and that committees maintain proper records. In the past, audits have often taken two to four years to complete.

Starting with the 1992 elections, however, the agency changed its audit procedures, modifying certain regulations, updating technology used to conduct the audits, and increasing the audit staff. The changes adopted by the Commission were discussed at length in *Annual Report 1992*, pp. 8-11. The impact of these changes began to be apparent in 1993. Most notably, by year's end, the agency had issued two Presidential audits (see below) and had completed the fieldwork on ten (out of a total of seventeen) audits. The process, itself, changed as well.

Full Disclosure of All Findings in Final Audit Report. Final audit reports issued in 1993 disclosed all findings, including those that might later become the subject of an enforcement action. (In the past, descriptions of certain findings were purged from the material before the audit report was released to the public.)

Records Inventory. Before starting fieldwork on an audit, staff conducted a thorough inventory of committee records. If records were not found to be satisfactory, the Commission gave the committee 30 days to correct the records or obtain the information. If the records remained unavailable after the 30 days, the Commission could proceed with subpoenas to obtain the needed records from appropriate parties. The records inventory procedures proved to be effective in 1992 and 1993, allowing the Commission to devote its resources to committees that were fully prepared for fieldwork.

Audit Testing Using Sampling Technique. The agency relied on a sampling technique to test contributions and supporting documentation to find excessive and prohibited contributions. This approach was designed to save time and money in the audit process without sacrificing the essential accuracy of audit

findings. In past years, auditors often reviewed lengthy contribution records to compile lists of potentially prohibited or excessive contributions.

By using the sampling technique in conjunction with other limited testing, the agency evaluated a committee's compliance with contribution limits and prohibitions as demonstrated in a sample of the committee's transactions. The Commission then projected the dollar value of contribution violations in each category, based on the apparent violations identified in the sample. In this way, sampling was used to develop the audit findings. In some instances, committees would now have to make payments to the U.S. Treasury, rather than refunds to contributors, to resolve findings of excessive and prohibited contributions.

Changes to Rules

Audits of the 1992 Presidential campaigns were the first conducted under the Commission's new rules simplifying the allocation of a campaign's expenses to state spending limits. New rules also required committees that had computerized their receipts and/or expenditures to submit that information on computer tapes or diskettes in a format compatible with industry standards.

Summaries of Audits

Agran for President 92. On June 8, the Commission approved the final audit report on Agran for President 92. The audit covered the period, August 21, 1991, through July 31, 1992. During that time, the committee had total receipts of \$630,442, total disbursements of \$593,253, and a closing cash balance of \$37,189. It received \$335,488 from 4,417 contributors.

The audit showed that the committee had not made reimbursements to individuals within the time periods required by 11 CFR 116.5, but by the time of the fieldwork, no expense reimbursements remained outstanding.

The campaign received \$269,691 in matching funds from the U.S. Treasury, an amount representing 1.95 percent of the \$13,810,000 maximum entitlement that any candidate could receive.

New York '92 Host Committee. On November 10, 1993, the Commission approved the final audit report

on the New York '92 Host Committee, Inc.—the host committee for the 1992 Democratic convention. (Host committees are established by cities hosting Presidential nominating conventions to encourage commerce and to project a favorable image of the city to convention attendees. Unlike party convention committees, host committees do not receive public funds.)

The audit report's findings included apparent prohibited contributions from two businesses located outside the New York metropolitan area, which the committee subsequently refunded; and the failure to disclose the actual value of certain in-kind contributions received and the source of interest income. The Commission required the committee to amend its reports accordingly.

Repayments—1988

As mentioned above, the Audit Division prepares an audit report for each committee, documenting the committee's financial activity for the consideration of the Commission.

The final audit report may include an initial determination by the Commission that the committee repay public funds. (The interim audit report, however, constitutes notification of a repayment determination.) A repayment is required when the Commission determines that a primary or general election committee received public funds in excess of the amount to which it was entitled, or incurred nonqualified campaign expenses. (There are other bases for repayment as well, such as stale-dated checks.) A committee that wishes to dispute the Commission's initial repayment determination may submit a written response and may also request an oral presentation before the Commission.

The basis for the Commission's final repayment determination is set forth in a statement of reasons prepared by the Office of General Counsel.

The paragraphs below summarize 1993 repayment actions with respect to 1988 Presidential committees. For other reports pertaining to 1988 candidates, see *Annual Report 1989*, pp. 14-15; *Annual Report 1990*, pp. 7-9; *Annual Report 1991*, pp. 8-10, and *Annual Report 1992*, pp. 11-13.

Jesse Jackson 1988 Campaign

On April 15, 1993, the Commission made a final determination ordering Jesse Jackson's 1988 Presidential campaign to repay \$122,031 in public funds to the U.S. Treasury. (The Jackson for President '88 Committee and two affiliated committees in New York and California had received over \$8 million in primary matching funds.) The campaign made a \$75,000 repayment in January 1993. The balance was paid in full by December 2, 1993.

In making its final determination, the Commission considered the campaign's responses throughout the audit process. For a summary of the final audit report, see *Annual Report 1992*, p.12. A large part of the repayment—\$91,192—represented the pro rata portion of \$294,115 in disbursements that were insufficiently documented. (A ratio formula is applied to nonqualified campaign expenses to determine what portion was paid with public funds, as opposed to private contributions, and must therefore be repaid to the U.S. Treasury.)

The repayment also included \$10,196 for matching funds received for excessive contributions; \$18,953 for the pro rata portion of \$61,127 in income tax penalties; and \$1,689 for stale-dated checks (checks never cashed by the payees).

LaRouche v. FEC²

Lyndon H. LaRouche, Jr., and the LaRouche Democratic Campaign '88 sought review of the FEC's final determination that the Campaign repay \$151,260 in federal matching funds to the U.S. Treasury. The FEC made the determination on September 17, 1992, and notified the Campaign in a letter dated September 22. (See *Annual Report 1992*, p. 12.) The petitioners filed their petition on October 22, 30 days after the September 22 letter date but 35 days after the September 17 determination.

On April 20, 1993, the U.S. Court of Appeals for the District of Columbia Circuit¹ denied the FEC's motion to dismiss this case, holding that petitioners had filed

their petition for judicial review within the 30-day time limit under the Presidential Primary Matching Payment Account Act.

Under that statute, petitions for review must be filed "within 30 days after the agency action by the Commission for which review is sought." (See 26 U.S.C. §9041(a).)

Final Repayment Determinations: Robertson, Dukakis and Simon 1988 Primary Campaigns

The Commission approved final repayment determinations requiring the 1988 Presidential primary campaign of Michael Dukakis to return \$491,282 in public funds to the U.S. Treasury and Senator Paul Simon's 1988 Presidential campaign to return \$412,163. (For summaries of the final audit reports of the Simon and Dukakis campaigns, see *Annual Report 1991*, p.9.) The final determinations and their supporting statements of reasons were approved on February 25 (Dukakis) and March 4 (Simon). The Dukakis for President Committee had received over \$9 million in primary matching funds, while the Paul Simon for President Committee had received almost \$3.8 million.

The repayments were due within 30 days of the committees' receipt of the final determinations. (The Commission accepted a \$485,000 check from the Dukakis committee in April 1991, and received the remaining \$6,282 by April 20, 1992.)

The statements of reasons responded to the committees' challenges to the agency's earlier initial repayment determinations. Both committees took the position that the agency had failed to notify them of their repayment obligations within the statutory three-year deadline, which expired July 20, 1991.

The Commission said that it had satisfied the three-year notification requirement by providing the committees with preliminary repayment calculations that were approved before the three-year period had expired. The preliminary calculations were included in the Dukakis and Simon interim audit reports issued in February 1990 and July 1990, respectively. The two committees, however, continued to challenge the Commission's position, taking the matter to court (see below).

¹ Commission actions under the Presidential public funding law are directly reviewable by this court. 26 U.S.C. §9041.

² No. 92-1555.

In another repayment determination in which a committee questioned the three-year deadline, the Commission voted, on September 23, to require Pat Robertson's 1988 Presidential campaign, Americans for Robertson, to repay \$290,794 in public funds to the U.S. Treasury. The campaign had received over \$10.4 million in primary matching funds. (For a summary of the final audit report, see *Annual Report 1992*, p. 11.)

The final repayment amount represented the pro rata portion of over \$950,000 in nonqualified campaign expenses incurred by the campaign. The campaign was also ordered to refund \$105,635 to news media organizations for travel overcharges.

In its December 1992 oral presentation, the Robertson campaign disputed the FEC's initial repayment determination, claiming that the agency had failed to notify the campaign of the final repayment amount within the three-year deadline. (See 26 U.S.C. §9038(c).) The Commission, however, said that the campaign had raised the issue too late for agency consideration. The agency said that the Robertson campaign, by failing to include the three-year notification argument in its written response, waived its right to raise the argument during the oral presentation or at any future stage of the repayment proceedings, including a court challenge to the final repayment.³ 11 CFR 9038.5(b). The Robertson campaign nevertheless used the late-notification argument in its court challenge to the repayment determination, as did the Dukakis and Simon campaigns. (See court cases below.)

Dukakis v. FEC⁴

Simon v. FEC⁵

Contending that the FEC failed to notify them of their repayment obligations within the three-year statutory deadline, petitioners asked the U.S. Court of Appeals

for the District of Columbia Circuit whether the FEC is time barred from requiring any repayment.

Although each suit raises other issues unique to its case, petitioners filed a joint motion asking the court to consolidate the two cases, since the ruling on the late-notification issue could resolve the cases without need to examine the other issues, should the court rule in the petitioners' favor. The court declined to consolidate the cases, but agreed to schedule the cases on the same day and before the same panel of judges.

Robertson v. FEC⁶

Pat Robertson and his 1988 Presidential campaign, Americans for Robertson, asked the U.S. Court of Appeals for the District of Columbia Circuit to review the FEC's determination that the campaign repay almost \$300,000 in public funds to the U.S. Treasury. Contending that the FEC failed to notify the campaign of its repayment obligation within the deadline specified in the law, the campaign asked the court whether the FEC had the authority to seek repayment. The Robertson campaign further asked the court to schedule the campaign's case before the same panel of judges who would hear the Simon and Dukakis suits (above) and on the same day as those suits. On December 13, the court of appeals denied the Robertson motion. The Commission had opposed the motion.

The Robertson campaign also filed a motion for summary reversal, arguing that the *NRA* decision (see Chapter One) rendered the Commission's repayment determination void, since it had been issued when the Commission still had ex officio members.⁷

³ By contrast, the Dukakis and Simon Presidential campaigns raised a similar notification argument in a timely fashion.

⁴ No. 93-1219.

⁵ No. 93-1252.

⁶ No. 93-1698.

⁷ The Court of Appeals denied the motion for summary reversal on February 22, 1994. The *NRA* decision may nevertheless be argued in subsequent briefs.

Public Funding: Legal Issues

1992 Matching Fund Entitlement: *LaRouche v. FEC*⁷

On July 2, 1993, the Court of Appeals for the District of Columbia Circuit⁸ directed the Commission to certify matching funds to Lyndon LaRouche, Jr., for his 1992 Presidential primary campaign. The court held that the Commission did not have statutory authority to deny matching funds based on its conclusion that Mr. LaRouche's past actions indicated that he would fail to keep his promise to comply with the law.

In February 1992, the agency had determined that Mr. LaRouche's written agreement and certification to comply with the law—a requirement for receiving matching funds—were not made in good faith. Mr. LaRouche had not complied with promises in candidate agreements he submitted to obtain public financing for his four previous Presidential campaigns. Moreover, he had been convicted of conspiracy to defraud the IRS and some of his own financial supporters. The Commission therefore found he was not eligible for matching funds. (See *Annual Report 1992*, p. 6.) Mr. LaRouche immediately challenged the decision in the D.C. Circuit.

On July 2, the court reversed the FEC's decision, holding that the statute did not grant the agency the authority to evaluate the reliability of a candidate agreement. The court found that the law's enforcement provisions, which grant the FEC the authority to take action with respect to past or ongoing violations of the law, implied a Congressional intent to withhold FEC authority to assess a candidate's future likelihood of violating the law in the context of a request for matching funds. The court observed that the voters should be the ones to judge a candidate's integrity.

The court further noted that Congress intended public funds to be dispensed on a nondiscriminatory basis: "Any inquiry into the bona fides of candidates' promises would take the Commission into highly subjective territory that would imperil the assurance of even-handed treatment."

The FEC had argued that its position was supported by the court's decision in *Committee to Elect Lyndon LaRouche v. Federal Election Commission (CTEL)*,⁹ which allowed the agency to consult other information in its possession when deciding whether to accept a candidate's current threshold submission for matching funds. The court, however, said that *CTEL* stressed the need to apply objective standards when evaluating a matching fund submission, quite different from the use of subjective criteria "to evaluate a candidate's character."

The majority opinion was filed by Judge Williams; an opinion concurring in part and dissenting in part was filed by Judge Wald. She concluded that, although the Commission had statutory authority to deny certification to candidates, the Commission had exceeded its statutory authority in its consideration of matters that were not directly related to Mr. LaRouche's campaign (such as his criminal convictions for mail fraud and conspiring to defraud the IRS).¹⁰

Funds Raised for Legal Expenses Related to Justice Department Investigation of Campaign Consultant

On August 26, the Commission issued AO 1993-15 to The Tsongas Committee, Inc., the 1992 Presidential campaign committee of former Senator Paul E. Tsongas, providing guidance on legal expenses incurred in connection with a Department of Justice (DOJ) investigation. The committee had retained a law firm to advise the campaign and its personnel during the course of a DOJ investigation of the campaign's principal fundraising consultant, who had been indicted on 47 counts of illegal activity. The indictment had indicated that the consultant might have misappropriated a large amount of campaign contributions.

⁷ No. 92-1100.

⁸ The three judge panel consisted of Judges Wald, Buckley and Williams.

⁹ 613 F.2d 834 (D.C. Cir. 1979).

¹⁰ The Supreme Court, without comment, refused to review this decision. No. 93-519. The Commission certified an initial \$100,000 in public funds to the campaign on February 17, 1994.

The Commission found that, with regard to activities being investigated that fell within the purview of the Federal Election Campaign Act and directly implicated its provisions, funds raised to defray the legal expenses were considered contributions, subject to the Act's limits, prohibitions and disclosure requirements. However, payments for such legal services were not subject to the Presidential primary expenditure limits. 11 CFR 100.8(b)(15).

This conclusion was consistent with past advisory opinions in which the Commission determined that the costs of legal representation for post-election FEC audit and enforcement matters were clearly within the scope of the Act. AOs 1990-17 and 1981-16. Although The Tsongas Campaign's situation pertained to a Justice Department investigation, that agency has criminal enforcement authority with respect to the Act, and many of the indictment counts had explicitly referred to violations of the Act (e.g., excessive loans) or false statements to the Commission.

Contributions from Candidate To Retire 1984 Presidential Debt

Presidential candidates who accept public funding must agree not to spend more than \$50,000 of their personal funds (or the funds of their families) in connection with the campaign. 26 U.S.C. §9035; 11 CFR 9035.2. Citing extraordinary circumstances, in AO 1993-19 the Commission voted to permit Senator John Glenn to contribute unlimited amounts of his personal funds to retire the debt from his 1984 Presidential campaign.

In waiving the personal funds limit in its advisory opinion of November 15, the Commission noted "the truly singular situation presented" by the Glenn campaign:

- Nearly ten years had passed since the debt was incurred;
- The obligation was large (approximately \$3.25 million); and
- Fundraising efforts to retire the debt had been largely unsuccessful.

In addition to using his personal funds, Senator Glenn was permitted to transfer excess funds from his Senatorial campaign committee to retire the Presidential debt. Transferred funds, however, had to consist of contributions that were raised for the Senate campaign, not to retire the Presidential debt.

Campaign Assessed \$100,000 Penalty

In an enforcement matter, MUR 3309, Senator Robert Dole's 1988 Presidential campaign committee, his leadership PAC and 11 other respondents entered into conciliation agreements with the FEC. Respondents agreed to pay civil penalties totaling nearly \$123,000 for violations discovered during the Commission's audit of the campaign. The Dole for President Committee (the campaign committee) and Campaign America (Senator Dole's leadership PAC) agreed to pay civil penalties of \$100,000 and \$12,000 respectively. The publicly funded campaign committee also agreed to refund over \$104,000 in excessive and prohibited contributions either to the contributors or to the U.S. Treasury.

During 1986 and 1987, Campaign America spent over \$47,000 on testing-the-waters activities on behalf of Senator Dole in Iowa and New Hampshire. Under 11 CFR 100.7(b)(1), payments made to test the waters for a future candidacy are not considered contributions, although they are subject to contribution limits and prohibitions. Once the individual triggers candidacy, however, the payments retroactively become reportable campaign contributions. Since Campaign America could legally contribute only \$5,000 to Senator Dole's Presidential campaign, it exceeded its contribution limit by more than \$42,000, and the campaign accepted the in-kind contributions. 2 U.S.C. §§ 441a(a)(2)(A) and 441a(f). The campaign agreed to refund the excessive amount.

The Dole for President Committee also accepted excessive contributions totaling over \$251,000 from individuals, partnerships and political committees; accepted \$64,000 in monetary and in-kind contributions from several corporations; failed to pay, in ad-

vance, for the use of corporate aircraft, thereby accepting prohibited extensions of credit; and exceeded the state spending limits in Iowa and New Hampshire by a total of more than \$588,000. In addition, the committee failed to make timely refunds from a legal and accounting compliance fund and failed to disclose the financial activity of 18 authorized delegate committees.

Presidential Campaign Overbilled Media for Travel

In another enforcement matter from 1988, the Commission found that Bush-Quayle '88, a publicly funded Presidential campaign, had overcharged the media \$133,819 in travel costs. In MUR 3385, the committee agreed to pay a \$10,000 civil penalty for the overcharges. Under the terms of the conciliation agreement, the campaign also had to refund the overpayment.

Chapter Four Legal Issues

To clarify the requirements of the Federal Election Campaign Act (the Act), the Commission promulgates regulations and also issues advisory opinions applying the law to specific situations. The Commission also has jurisdiction over the civil enforcement of the Act. This chapter examines major legal issues confronting the Commission during 1993 as it considered regulations, advisory opinions and enforcement actions.

Constitutionality of the Commission

The salient legal issue faced by the Commission during 1993 was an unusual one: the constitutionality of the composition of the Federal Election Commission itself.

As discussed in the first chapter, on October 22 the U.S. Court of Appeals for the District of Columbia found, in *FEC v. NRA Political Victory Fund*, that the composition of the Federal Election Commission “violates the Constitution’s separation of powers.” In the wake of the appeals court decision, the Commission undertook a series of actions to ensure the uninterrupted enforcement of the federal election laws. These steps, explained in more detail in the first chapter, included:

- Voting to reconstitute itself as a six-member body, comprising only Commissioners who have been appointed by the President with the advice and consent of the Senate, pending review by the Supreme Court;
- Exclusion of ex officio members and their special deputies from access to any confidential Commission documents or matters;
- Adopting specific procedures for ratifying or voting again on Commission decisions pertaining to open enforcement cases (Matters Under Review, or MURs) and litigation;
- Ratifying or voting again on Commission audit and public financing determinations;
- Ratifying existing federal campaign finance regulations and forms;
- Issuing a policy statement reaffirming the validity of advisory opinions issued before the court opinion;

- Deciding to petition the Supreme Court for a writ of certiorari in the case; and
- Informing all registered federal political committees of these actions in a letter from the Chairman.

“Best Efforts”

Under 11 CFR 104.7, political committees and their treasurers must exercise “best efforts” to obtain, maintain and report the identification of individuals who contribute more than \$200 in a calendar year. “Identification” means the name, mailing address, occupation and employer of the individual. The Commission examined the “best efforts” standard during 1993 in the context of an enforcement matter as well as in a revision to its regulations.

Compliance Matter

In Matter Under Review (MUR) 3528, the Commission found that a committee that had subsequently received missing contributor information for a previously reported contribution was required to disclose the new information in an amended report.

The campaign committee in MUR 3528 had used best efforts to “obtain and maintain” the required information, but had failed to “submit” it in amended reports. The committee filed two consecutive reports lacking occupation and employer information for several contributors. The committee was later successful in obtaining the missing information from 38 contributors whose contributions totaled \$28,475. The committee did not, however, amend its reports to reflect the information until the Commission had found reason to believe that the committee had violated the reporting provisions. The committee agreed to pay a \$2,000 civil penalty.

Final Rules on “Best Efforts”

On October 21, the Commission revised its rules¹ to clarify the steps that a committee must take to demonstrate that it has made “best efforts”:

- Requesting contributor information in the initial solicitation;
- Making a follow-up request (if necessary);

¹ The regulations became effective on March 3, 1993.

- Reporting the information; and
- Filing amendments to disclose previously unreported information.

For a summary of the new rules, see Appendix 11.

Preemption of State Laws

The extent to which the Federal Election Campaign Act (the Act) preempts provisions of state campaign finance laws has long been an issue of concern to the election community. At 2 U.S.C. §453, Congress specified, "The provisions of this Act, and of rules prescribed under this Act, supersede and preempt any provision of State law with respect to election to Federal office." Preemption questions were a focus of concern in a number of matters involving the Commission during 1993.

Minnesota: *Weber v. Heaney*

On June 17, 1993, the U.S. Court of Appeals for the Eighth Circuit held that the Act preempted the Minnesota Congressional Campaign Reform Act (MCCR) in its entirety. The Court's decision in *John Vincent Weber, et al. v. William M. Heaney, et al.* affirmed a district court holding. The Commission had filed a "friend of the court" brief.

Under the MCCR, candidates for the U.S. House and Senate who were listed on the general election ballot could choose to limit their campaign expenditures to specified amounts. A contributor to these candidates could then receive up to a \$50 refund from the state. If one candidate agreed to observe the limit but a major party opponent did not, neither candidate was subject to the spending limit, but the first candidate was entitled to a public funding grant from the state.

The FEC had addressed the Minnesota preemption question in Advisory Opinion (AO) 1991-22, requested by three members of the Minnesota delegation to the U.S. Congress. In that opinion, the Commission concluded that the MCCR sought to regulate an area under the sole authority of federal law and was therefore preempted. The requesters, seeking the same ruling from the courts, filed suit against the state officials responsible for enforcing the Campaign Reform Act.

On June 11, 1992, the U.S. District Court for the District of Minnesota held that the MCCR was preempted in its entirety based on the FEC's interpretation of the federal preemption provision. The court permanently enjoined Minnesota from implementing or enforcing the MCCR.

In its decision of June 17, 1993, the court of appeals also found the FEC preemption regulation to be controlling: "We find this duly authorized regulation is a further express preemption of the Campaign Reform Act."

Washington State

A number of FEC advisory opinions issued during 1993 addressed preemption questions as well. In AO 1992-43, the Commission found that the Act preempted the fundraising restrictions of a Washington State law as it related to fundraising by state legislators to retire campaign debts remaining from a federal campaign. State Senator Tim Erwin could therefore raise funds to retire his 1992 federal campaign debt without regard to the state law's time constraints on conducting such activity.

Michigan

In AO 1993-9, the Commission found that the Michigan Republican State Committee could accept corporate donations to its building fund for a party headquarters despite a Michigan State law that would have prohibited the use of corporate funds for an office used even occasionally for campaign purposes. The state law is superseded by federal law, which clearly permits such donations. Under the Act and FEC regulations, donations specifically designated to pay for the construction or purchase of a national or state party office facility are exempt from the prohibitions and limits on contributions provided the facility is not acquired for the purpose of influencing any particular federal election. 2 U.S.C. §431(8)(B)(viii); 11 CFR 100.7(b)(12), 100.8(b)(13) and 114.1(a)(2)(ix).

Tennessee

The Act also supersedes Tennessee State law with respect to the state law's restrictions on certain contributions by committees that have incorporated for

liability purposes only, according to AO 1993-8. Congressman John J. Duncan, Jr. (TN, 2nd CD) proposed transferring funds remaining in his old committee to his new federal reelection committee, incorporated under 11 CFR 114.12(a). That provision permits a political committee to incorporate for liability purposes only and not be treated as a corporation subject to the Act's prohibitions. The new committee planned to use the excess funds to make contributions to party committees and candidates. Tennessee law, however, prohibits corporations—including those which incorporate for liability purposes only—from supporting any candidate or political party. Because the Act supersedes any provision of State law with respect to election to federal office, federal law clearly supersedes Tennessee law with respect to contributions to federal candidates. Because the federal provisions explicitly permit the transfer of excess funds to party committees, regardless of whether they are federal committees under the Act, federal law supersedes Tennessee law in this respect as well. However, the Act does not supersede state law concerning contributions to nonfederal candidates.

Massachusetts

One 1993 advisory opinion involved preemption and the Commission's allocation regulations as well. Commission regulations require committees that maintain separate federal and nonfederal bank accounts to allocate certain expenses between those accounts, according to specific formulas. 11 CFR 106.5 and 106.6. In AO 1993-17, the Commission determined that these rules preempted a Massachusetts requirement that party committees pay a prescribed portion of shared federal/nonfederal expenses with funds raised under state law. As a result, the Massachusetts Democratic Party was permitted to use federal funds to pay up to 100 percent of its allocable administrative expenses. To the extent that the state provision denied the state party committee that flexibility, the Commission preempted it.

Ohio

In AO 1993-21, the Commission found that the Act preempted an Ohio statute that effectively prohibited the transfer of tax-checkoff funds from a "separate segregated account" to an allocation account, as prescribed in the FEC's allocation regulations.

Under Ohio law, each political party received a share of the proceeds from the state's income tax checkoff. The parties were required to deposit the checkoff funds into a "separate segregated account," and were prohibited from commingling them with any other party funds. Checkoff funds could be used only to support party activities, including the party's administrative and get-out-the-vote expenses. The funds could not be used to further the election or defeat of any particular candidate or to pay a party debt incurred as the result of an election.

Expenditures for administrative and get-out-the-vote activities and other, similar expenditures permissible under state law are subject to the FEC's allocation rules. Those rules require committees that maintain separate federal and nonfederal accounts to allocate certain shared federal/nonfederal expenses according to specific formulas. 11 CFR 106.5 and 106.6. Federal law preempts the Ohio provision that purports to bar the transfer of tax-checkoff funds from the party's "separate segregated account" to its allocation account. However, nothing in the Act or FEC rules prevents the state from auditing the use of state revenues to ensure compliance with state laws.

Rhode Island

In AO 1993-14, the Commission found that the Act supersedes a state law that would impose registration, reporting and contribution requirements on the federal account of the Rhode Island Democratic State Committee and on federal political committees making contributions to the federal account. The party committee's federal account was a federally registered committee used solely for federal election activity. (The party also had a nonfederal account registered with the state.) In the absence of nonfederal activity by the federal account, the imposition of

the state's registration, reporting and compulsory contributions requirements on the federal account would encroach upon the Act's authority in those areas. The state requirements, therefore, would not apply to the federal account. Nor would they apply to a political committee solely because of its contribution to the federal account.

Candidate Issues

New Rules on Transfers from Nonfederal Campaigns

During 1993, the Commission also considered a number of issues involving funds used by candidates for federal office.

Under a regulation that became effective on July 1, the Commission prohibited transfers of funds and assets from a candidate's nonfederal campaign to his or her federal campaign (11 CFR 110.3(d)). (For more information about previous Commission consideration of this issue, see *Annual Report 1992*, p. 31.)

If a federal campaign committee had received transfers of funds from the candidate's nonfederal committee, it was required to identify any nonfederal funds remaining in its account as of July 1 and to remove them by July 31. The Commission originally intended to set April 1 as the effective date for the new regulation, but to avoid changing rules in the midst of special elections, it postponed the date to July 1.

Rulemaking on Personal Use of Campaign Funds

During the year the Commission used the regulatory process to address another issue that directly affected federal candidate committees: the Act's prohibition on the personal use of excess campaign funds.

The prohibition on the use of excess campaign funds was first set out in the 1979 amendments to the Act at 2 U.S.C. §439a. That provision stated that "no such amounts may be converted by any person to any personal use...."

However, the Act also contained a "grandfather clause" that exempted individuals who were Members of Congress on January 8, 1980, from the prohibition on personal use.

In its consideration of specific situations concerning the use of campaign funds over the years, the Commission has tried to balance the desire of Congress to prohibit the personal use of campaign funds against the need to give candidates and their campaigns the discretion to conduct their campaigns as they see fit. However, until recently, most advisory opinions about the use of campaign funds involved "grandfathered" Members. Consequently, the Commission was not often called upon to rule on the personal use of funds.

Then, in 1989, Congress repealed the "grandfather clause" under the Ethics Reform Act of 1989, and Members serving in the 103rd Congress or later Congresses were subject to the "personal use" prohibition.

Under the Commission's proposed rule, published on August 30,² a federal campaign committee would be prohibited from using campaign funds to pay a salary to the candidate, to pay the candidate's ordinary household expenses, or to pay any personal use expense—an expense that would exist regardless of the campaign, and that would not be related to officeholder duties.³

Use of Funds by Former Member

Proposed uses of campaign funds were at issue in several advisory opinion requests received by the Commission in 1993.

In AO 1993-6, issued to Citizens for Congressman Panetta, the Commission resolved several questions about the personal use of excess campaign funds by a former Member of Congress who was no longer "grandfathered." Although formerly eligible to convert excess campaign funds to personal use because he was a Member of Congress on January 8, 1980, Leon Panetta lost that status when he was sworn in as a Member of the 103d Congress on January 5, 1993.

The Commission found that the committee could not use excess campaign funds for Mr. Panetta's personal use, but that it could use them to pay hotel expenses related to closing down his Congressional

² 58 FR 45463

³ A public hearing on these proposed rules was held on January 12, 1994.

office; to pay his travel expenses for certain political party appearances; and to make charitable donations. However, the committee could not cover travel expenses for days spent on personal activity or fees for Mr. Panetta's membership in tax-exempt organizations, as these would constitute a prohibited personal use of excess funds. The committee could also use campaign funds for operating expenditures to wind down its activities.

Mr. Panetta resigned his Congressional seat on January 21 and was sworn in to his new position, Director of the Office of Management and Budget (OMB), on January 22. The law permits the use of excess campaign funds to defray expenses in connection with the individual's duties as a federal officeholder. The committee could therefore pay hotel expenses related to Mr. Panetta's Congressional duties. Because the term "federal office" applies only to elected federal offices, however, the committee could not pay hotel expenses related to Mr. Panetta's duties as OMB Director, an appointed position. Payment of those expenses would constitute personal use of excess campaign funds.

Use of Funds for Campaign Storage

In another "personal use" matter, AO 1993-1, Congressman Dan Burton proposed using personal funds to build a storage shed on his property and then renting the unit to his campaign committee for storage of campaign materials. He planned to charge rent equivalent to that charged by commercial storage firms in the area. The Commission had previously concluded that this type of arrangement was permissible. Quoting AO 1988-13, the Commission cautioned that "[i]f such rental payments by a candidate's campaign committee represent more than the usual and normal charge for the use of the facilities in question, the amount in excess of the usual and normal charge would be subject to the personal use ban of 2 U.S.C. §439a."

Other Lawful Purposes

In two other AOs, the Commission found that proposed uses of campaign funds did not constitute personal use of the funds and were therefore permis-

sible. In AO 1993-13, the Commission said that the Fowler for Senate Committee, the 1992 campaign committee of former Senator Wyche Fowler, could donate its remaining funds to establish a scholarship program for minority students at Oglethorpe University.

In AO 1993-10, Antonio J. Colorado, a 1992 candidate for Resident Commissioner of Puerto Rico, proposed using excess funds for three activities: conducting a public opinion survey in preparation for a 1994 campaign for governor; transferring funds to a committee formed to support his election as president of the Popular Democratic Party; and transferring funds to a nonprofit corporation he planned to form but from which he would not benefit financially. The Commission found that such activities were permissible under the "any other lawful purpose" clause of §439a, but noted that any Puerto Rican law applicable to the proposed activities would not be preempted by the Act.

Coordinated Party Expenditures

FEC v. Colorado Republican Federal Campaign Committee

On August 31, 1993, a Colorado district court ruled that a communication by a party committee is subject to the coordinated party expenditure limits under 2 U.S.C. §441a(d) only if it "expressly advocates" the election or defeat of a candidate. The court defined "express advocacy" as a direct plea for specific action, using words such as "elect," "support," "defeat" or "reject." Based on these conclusions, the U.S. District Court for the District of Colorado granted summary judgment to the Colorado Republican Federal Campaign Committee. The court held that the Committee's \$15,000 expenditure for a radio ad, because it did not contain "express advocacy," was not subject to the coordinated party expenditure limit. The FEC had claimed that the advertisement had caused the Committee to exceed its party expenditure limit in a Senate race.

In April 1986—four months before the Democratic primary and seven months before the November general election—the Committee ran a radio ad in

response to a series of television ads sponsored by the Senate campaign committee of then-Congressman Wirth, a Democrat. The Committee's ad contrasted Mr. Wirth's campaign statements with his voting record, concluding with: "Tim Wirth has a right to run for the Senate, but he doesn't have a right to change the facts." The Committee reported the \$15,000 payment as an operating expense for "voter information to Colorado voters—advertising."

Under the Act, the Committee could spend up to a specified limit on coordinated party expenditures made "in connection with the general election campaign" of the Republican Party candidate running in the U.S. Senate race in Colorado. 2 U.S.C. §441a(d)(3).

The court concluded that the Committee's expenditure would be subject to the §441a(d) limits only if it were made "in connection with" the general election campaign of the Senate nominee. The court looked to the Supreme Court's interpretation of "in connection with" in *Federal Election Commission v. Massachusetts Citizens for Life, Inc. (MCFL)*, a case which involved the prohibition on corporate and labor contributions and expenditures under 2 U.S.C. §441b. In *MCFL*, the Supreme Court held that "an expenditure must constitute 'express advocacy' in order to be subject to the prohibition of §441b." *MCFL*, 479 U.S. 238, 249 (1986). The district court found that a canon of statutory construction—namely, that identical words used in different parts of the same statute have the same meaning—applied to sections 441b and 441a(d) because they had a similar purpose, to regulate expenditures by organizations. The court therefore concluded: "[E]xpress advocacy' is required in order for a coordinated expenditure to be 'in connection with' the general election campaign of a candidate for federal office under section 441a(d)(3)."

The court went on to consider whether the committee's radio ad constituted "express advocacy." The court pointed out that the Supreme Court, in *Buckley v. Valeo*, defined "express advocacy" as "express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' or 're-

ject.'" *Buckley*, 424 U.S. 1, 46 n.52 (1976). Using this language as a bright-line test for express advocacy, the court said that "[t]he Advertisement does not contain any words which expressly advocate action. At best, as plaintiff suggests, the Advertisement contains an indirect plea for action."

The FEC never explicitly addressed the issue of whether the ad constituted "express advocacy." Instead, it was the agency's position that section 441a(d) was applicable because the ad contained an electioneering message against Mr. Wirth in favor of the eventual Republican nominee based on the surrounding circumstances: The ad responded to Mr. Wirth's TV ads; he was identified as a Senate candidate; and the disclaimer identified the Republican Committee as the ad's sponsor. The court, however, declined to consider the surrounding circumstances, holding that the *Buckley* Court created a bright-line test for express advocacy.

In October 1993, both the Commission and the Colorado party Committee appealed the district court's decision to the U.S. Court of Appeals for the Tenth Circuit.

Texas Special Election

In AO 1993-2, the Commission considered how the coordinated party expenditure limits would apply with respect to the Texas special election to fill the Senate seat vacated by the resignation of Lloyd Bentsen to become Secretary of the Treasury. A special general election was scheduled May 1; under Texas law, a special runoff election would be scheduled later if no candidate in the May 1 election won a majority of the vote. The Democratic Senatorial Campaign Committee (DSCC), planning to make coordinated party expenditures for the party's candidate in the special election, requested an advisory opinion about how the §441a(d) limit would apply.

The Commission said that, if a runoff were held, it would not be considered a separate election for purposes of the §441a(d) limit. Therefore, the DSCC had a single §441a(d) limit covering both the general and the runoff. However, the runoff election would be considered a separate election for purposes of the contribution limit.

New Multicandidate Committee Rules

The Commission adopted new requirements for multicandidate committees to take effect January 1, 1994. The rules were designed to make it easier to identify committees that have achieved multicandidate status. Multicandidate committees may contribute up to \$5,000 to a candidate per election; other committees are subject to a \$1,000 per election limit. (To qualify for multicandidate status, committees must receive contributions from at least 51 persons, be registered at least six months and contribute to at least five federal candidates. The last requirement does not apply to state party committees.)

Under the new rules, committees that have qualified for multicandidate status must disclose that fact on each report (Form 3X) they file. Committees that have not disclosed their multicandidate status by January 1, 1994, must also submit an FEC Form 1M to demonstrate that they have met the multicandidate criteria, before they contribute more than \$1,000 to a candidate per election. In addition, multicandidate committees must include written notice of their status with each contribution they make.

Corporate/Labor Activity

Under 2 U.S.C. §441b, corporations, labor organizations and incorporated membership organizations are prohibited from making contributions or expenditures in connection with federal elections. The Act does, however, permit such organizations to participate in certain activities that are exempt from the definition of contribution and expenditure. For example, such an organization may establish a separate segregated fund (SSF), often called a political action committee (or PAC). During 1993, the Commission addressed issues of interest to corporations and labor organizations both in advisory opinions and in the agency's regulations.

Solicitable Class of Corporation

Blue Cross of California (BCC) proposed to solicit contributions to its separate segregated fund (SSF) from three classes of employees. In AO 1993-16, the

Commission concluded that only one of those classes—regional sales managers—could be solicited as “executive or administrative personnel” under 11 CFR 114.5.

Under that regulation, an SSF may solicit contributions, at any time, from its executive and administrative personnel, stockholders and the families of both groups. 11 CFR 114.5(g). “Executive or administrative personnel” is defined as corporate employees who are paid on a salary basis and “have policymaking, managerial, professional, or supervisory responsibilities.” 11 CFR 114.1(c).

All three classes of employees that BCC planned to solicit—telemarketing representatives, lead telemarketing representatives and regional sales managers—were paid, in part, on a salary basis, but only the sales managers had sufficient supervisory responsibilities to qualify as “executive or administrative personnel.” Unlike the other classes, the managers routinely monitored the quality of sales work, planned sales strategies and handled other “supervisory, administrative and professional responsibilities.” By contrast, the two classes of telemarketing representatives focused primarily on sales.

Corporate Plan to Encourage Volunteer Political Activity

Southwestern Bell Corporation and its subsidiaries (SBC) proposed to undertake a program to encourage individuals to volunteer on behalf of candidates' campaigns. Under the program, SBC would ask all candidates running for a particular office how volunteers could best help with their campaigns, whom the volunteers should contact and when they would be needed. SBC would then disseminate this information in writing or through candidate information booths set up in company locations. SBC companies might also invite candidates on a nonpartisan basis to make appearances at company locations, at which time the company would provide the relevant volunteer information.

In AO 1993-18, the Commission found that SBC could offer the program to employees and stockholders, but not to retirees or the general public. Federal election law prohibits corporations from making contri-

butions or expenditures in connection with federal elections. Corporations may, however, make partisan and nonpartisan communications, subject to certain conditions (see 11 CFR 114.3 and 114.4). Since the communications contemplated by SBC did not favor one candidate over another, the rules governing nonpartisan communication applied. Those rules permit a corporation to communicate with its employees and stockholders, and with the general public, provided that the specific guidelines at 114.4 are followed.

Permissible nonpartisan communications to the general public are limited to voter registration and get-out-the-vote information; distribution of official registration or voting materials; voting records not prepared for the purpose of influencing an election; voter guides; and nonpartisan candidate debates. SBC's program to gather and distribute volunteer information did not fall within these categories. Therefore, SBC could not offer the volunteer information to the general public. Because the regulations at 11 CFR 114.4 do not distinguish between company retirees and the general public, retirees could not receive the volunteer information either.

The Commission noted that prior consultation with and receipt of information from candidates' campaigns would compromise the ability of SBC's SSF to make independent expenditures on behalf of the campaigns.

Regulations on Definition of Member

In 1993, the Commission prescribed regulations specifying the voting rights and financial attachments necessary for persons to qualify as "members" of incorporated membership groups. Only qualified "members" are eligible to receive PAC solicitations and partisan communications from the incorporated membership group. See 2 U.S.C. §441b(b)(2)(A) and (4)(C). The membership rules apply to both individual and corporate members. Although a membership group may not solicit contributions from its corporate members, it may direct partisan communications to

individual representatives of corporate members, and a trade association may seek approval from its corporate members to solicit their solicitable class for contributions to the association's PAC. 11 CFR 114.8(d) and (h).

A membership association is defined as a labor organization or as an incorporated membership organization, trade association, cooperative or corporation without capital stock that expressly:

- Provides for members in its articles and by-laws
- Seeks members; and
- Acknowledges the acceptance of membership, such as by sending membership cards to new members or including them on a membership newsletter list. 11 CFR 100.8(b)(4)(iv)(A) and 114.1(e)(1).

In addition to satisfying the association's requirements for membership, a member must affirmatively accept the membership invitation and meet *one* of the following three conditions:

1. *Regular Dues/Limited Voting Rights.* The member is required to pay dues of a specific amount on a regular basis (e.g., annually or monthly) and is entitled to vote directly for: (a) at least one member who has full participatory and voting rights on the highest governing body of the association, or (b) those who select at least one member of those on the highest governing body.

2. *Significant Financial Attachment.* The member has some significant financial attachment to the membership association, such as a significant investment or ownership stake, but not merely the payment of dues.

3. *Full Voting Rights.* The member is entitled to vote directly for all of those on the highest governing body of the membership association. 11 CFR 100.8(b)(4)(iv)(B) and 114.1(e)(2).

For a summary of the new regulations, see Appendix 7.

Native American Tribe as a Federal Contractor

The Commission concluded, in AO 1993-12, that the Mississippi Band of the Choctaw Indians was a “federal contractor” because the tribe had entered into procurement contracts with agencies of the federal government. As a result, the tribe could not make contributions in connection with federal elections during the term of these agreements since contributions from federal contractors are prohibited. 2 U.S.C. §441c.

The Choctaw Tribe entered into three types of agreements with the federal government: self-determination contracts, grant agreements and procurement contracts. Self-determination contracts with the U.S. Department of the Interior provide funds for the tribe to run programs that would otherwise be managed by Interior. Grant agreements provide federal funds (e.g., for vocational training) to the tribe because of its status as a government entity. The procurement contracts, by contrast, involve the sale of tribe-produced items to the federal government (e.g., to the Bureau of Indian Affairs).

Under Commission regulations, the ban on contributions by federal contractors applies to a person who enters into a contract with the government to provide property or services. 11 CFR 115.1. The tribe’s self-determination contracts and grant agreements do not involve the provision of property or services to the government, but its procurement contracts do—making the tribe a federal contractor.

As a federal contractor, the tribe may not make contributions in connection with federal elections. Moreover, the Act and Commission regulations do not permit federal contractors to segregate the proceeds of their contracts from other funds as a means of avoiding the prohibitions of §441c. The Commission noted, however, that individual members of the tribe could make personal contributions or form a nonconnected political committee. 11 CFR 115.6 and AOs 1985-23, 1984-10 and 1984-12.

Procedural Matters

Spannaus v. FEC

On April 20, 1993, the U.S. Court of Appeals for the District of Columbia Circuit ruled on the 60-day deadline for requesting a court review of an FEC decision to dismiss an administrative complaint. No. 92-5191. The court held that the 60-day period begins on the date the FEC decides to dismiss the complaint, based on the wording of the statute. The appellant, Edward W. Spannaus (treasurer of the LaRouche Democratic Campaign), had argued that the period should begin on the date the complainant receives notice of the dismissal. The ruling by the court of appeals affirmed the district court’s dismissal of the suit. No. 91-0681.

Under the Act, a petition for judicial review must be filed “within 60 days after the date of the dismissal” of the complaint. 2 U.S.C. §437g(a)(8)(B). The court of appeals said that, in accordance with a Supreme Court decision on filing deadlines, the statutory language must be read literally. Therefore, based on the “date of dismissal” of the complaint, the court of appeals found that Mr. Spannaus filed his petition for review after the 60-day deadline.

(The Commission dismissed Mr. Spannaus’s complaint on January 9, 1991. The notice of dismissal arrived at his post office box on January 28 and was claimed on February 2. He filed his petition for review with the district court on April 2, 1992.)

Mr. Spannaus said that he had relied on a district court opinion holding that the 60-day review period begins “when the complainant actually receives notice of the dismissal.” *Common Cause v. Federal Election Commission*, 630 F. Supp. 508, 512 (D.D.C. 1985). The court of appeals, however, rejected that holding. Commenting on the appellant’s reliance on *Common Cause*, the court stated that it “[could not] extend the filing deadline for Spannaus simply because he relied on an unreviewed and, we now hold, incorrect district court decision.”

Mr. Spannaus alternatively argued that he should be granted a dispensation from the 60-day time period in light of his late receipt of the FEC's notice of dismissal. The court refused the request, noting that Mr. Spannaus "was less than fully diligent" in filing his review petition. The court pointed out that the FEC's notification letter "conspicuously stated the dismissal date and referred Spannaus to the appropriate review provision."

FEC v. Political Contributions Data, Inc. (PCD)

Reversing a district court decision, the U.S. Court of Appeals for the Second Circuit, on June 17, 1993, found that the FEC was liable for payment of PCD's attorney's fees because the agency's position on the "sale or use" restriction was not "substantially justified." 955 F.2d 383. (The U.S. District Court for the Southern District of New York had previously said that the FEC was "substantially justified" in bringing suit against PCD and that the FEC's position had a "reasonable basis both in law and fact." 807 F. Supp. 311.)

The appeals court instructed the district court to determine the appropriate award of fees and expenses. The FEC asked for a rehearing or a rehearing *en banc*, but the court of appeals denied the request. The Commission has asked the Supreme Court to review the appeals court's decision.⁴

For more information about this case, see *Annual Report 1992*, p. 33.

Khachaturian v. FEC

In *Khachaturian v. FEC*, the court of appeals clarified the meaning of 2 U.S.C. §437h, the provision that allows plaintiffs to challenge the constitutionality of the election law. Section 437h provides that the district court "shall certify all questions of constitutionality" of the Act to the U.S. court of appeals.

Mr. Khachaturian, who was an independent candidate for the U.S. Senate in Louisiana's 1992 open primary, filed suit shortly before the election. He contended that the \$1,000 limit on contributions from individuals discriminated against his candidacy because it prevented him from raising sufficient funds to wage a competitive campaign. The district court certified his constitutional questions to the U.S. Court of Appeals for the Fifth Circuit without conducting any preliminary proceedings.

The court of appeals, however, remanded the case to the lower court with instructions to determine whether certification was merited.

On May 17, 1993, the U.S. District Court for the Eastern District of Louisiana dismissed the case, ruling that Mr. Khachaturian had failed to raise a substantial constitutional challenge to the \$1,000 contribution limit.⁵

⁴ The Commission's petition for a writ of certiorari was denied on February 22, 1994.

⁵ Mr. Khachaturian then appealed the dismissal, but on October 13, the U.S. Court of Appeals for the Fifth Circuit dismissed the case at Mr. Khachaturian's request. No. 93-3365.

Chapter Five Legislative Recommendations

Public Financing

State Expenditure Limits for Publicly Financed Presidential Primary Campaigns

Section: 2 U.S.C. §441a

Recommendation: The Commission recommends that the state-by-state limitations on expenditures for publicly financed Presidential primary candidates be eliminated.

Explanation: The Commission has now administered the public funding program in five Presidential elections. Based on our experience, we believe that the limitations could be removed with no material impact on the process.

Our experience has shown that, in past years, the limitations have had little impact on campaign spending in a given state, with the exception of Iowa and New Hampshire. In most other states, campaigns have been unable or have not wished to expend an amount equal to the limitation. In effect, then, the administration of the entire program has resulted in limiting disbursements in these two primaries alone.

If the limitations were removed, the level of disbursements in these states would obviously increase. With an increasing number of primaries vying for a campaign's limited resources, however, it would not be possible to spend very large amounts in these early primaries and still have adequate funds available for the later primaries. Thus, the overall national limit would serve as a constraint on state spending, even in the early primaries. At the same time, candidates would have broader discretion in the running of their campaigns.

Our experience has also shown that the limitations have been only partially successful in limiting expenditures in the early primary states. The use of the fundraising limitation, the compliance cost exemption, the volunteer service provisions, the unreimbursed personal travel expense provisions, the use of a personal residence in volunteer activity exemption, and a complex series of allocation schemes have developed into an art which, when skillfully practiced, can partially circumvent the state limitations.

In addition, experience has shown that one of the Congressional concerns motivating the adoption of state expenditure limits is no longer an issue. Congress adopted the state limits, in part, as a way of discouraging candidates from relying heavily on the outcome of big state primaries. The concern was that candidates might wish to spend heavily in such states as a way of securing their party's nomination. In fact, however, under the public funding system, this has not proven to be an issue. Rather than spending heavily in large states, candidates have spent large amounts in the early primaries, for example, in Iowa and New Hampshire.

Finally, the allocation of expenditures to the states has proven a significant accounting burden for campaigns and an equally difficult audit and enforcement task for the Commission. For all these reasons, the Commission decided to revise its state allocation regulations for the 1992 Presidential election. Many of the requirements, such as those requiring distinctions between fundraising and other types of expenditures, were eliminated. Since the Commission has not yet completed its administration of this Presidential cycle, the full impact of these changes is not yet clear. However, the rules could not undo the basic requirement to demonstrate the amount of expenditures relating to a particular state. Given our experience to date, we believe that this change to the Act would still be of substantial benefit to all parties concerned.

Compliance Fund

Section: 2 U.S.C. §441a(b)(1)(B); 26 U.S.C. §§9002(11), 9003(b) and (c), 9004(c)

Recommendation: The Commission recommends that Congress clarify what funds Presidential Election Campaign Fund recipients may utilize to meet the accounting and compliance requirements imposed upon them by the Federal Election Campaign Act. If private funds are not to be used, Congress may wish to either raise the spending limits to accommodate such costs or establish a separate fund of the Treasury to be used for this purpose.

Explanation: Through regulation, the Commission has provided for the establishment by Presidential com-

mittees of a General Election Legal and Accounting Compliance Fund (GELAC fund) consisting of private contributions otherwise within the limits acceptable for any other Federal election. The GELAC funds, which supplement funds provided out of the U.S. Treasury, may be used to pay for costs related to compliance with the campaign laws. Determining which costs may be paid is sometimes difficult and complex. Contributions to the GELAC fund are an exception to the general rule that publicly funded Presidential general election campaigns may not solicit or accept private contributions. Congress should clarify whether GELAC funds are appropriate and, if not, specify whether additional federal grants are to be used. If GELAC funds are appropriate, Congress should provide guidelines indicating which compliance costs are payable from such funds.

Supplemental Funding for Publicly Funded Candidates (revised 1994)

Section: 26 U.S.C. §§9003 and 9004

Recommendation: The Commission recommends that Congress consider whether to modify the general election Presidential public funding system in instances where a nonpublicly funded candidate exceeds the spending limit for publicly funded candidates.

Explanation: Major party Presidential candidates who participate in the general election public funding process receive a grant for campaigning. In order to receive the grant, the candidate must agree to limit expenditures to that amount. Candidates who do not request public funds may spend an unlimited amount on their campaign. Congress may want to consider whether the statute should ensure that those candidates who are bound by limits are not disadvantaged.

Applicability of Title VI to Recipients of Payments from the Presidential Election Campaign Fund (revised 1994)

Section: 26 U.S.C. §§9006(b), 9008(b)(3) and 9037.

Recommendation: The Commission recommends that Congress clarify that committees receiving public

financing payments from the Presidential Election Campaign Fund are exempt from the requirements of Title VI of the Civil Rights Act of 1964, as amended.

Explanation: This proposed amendment was prompted by the decision of the U.S. District Court for the District of Columbia in *Freedom Republicans, Inc., and Lugenia Gordon v. FEC*, 788 F. Supp. 600 (1992), *vacated*, No. 92-5214 (D.C. Cir. January 18, 1994). The Freedom Republicans' complaint asked the district court to declare that the Commission has jurisdiction to regulate the national parties' delegate selection process under Title VI. It also requested the court to order the Commission to adopt such regulations, direct the Republican Party to spend no more of the funds already received for its 1992 national nominating convention, and seek refunds of moneys already disbursed if the Republican Party did not amend its delegate selection and apportionment process to comply with Title VI. The district court found that the Commission "does have an obligation to promulgate rules and regulations to insure the enforcement of Title VI. The language of Title VI is necessarily broad, and applies on its face to the FEC as well as to both major political parties and other recipients of federal funds." 788 F. Supp. at 601.

The Commission appealed this ruling on a number of procedural and substantive grounds, including that Title VI does not apply to the political parties' apportionment and selection of delegates to their conventions. However, the court of appeals overruled the district court decision on one of the non-substantive grounds, leaving the door open for other lawsuits involving the national nominating conventions or other recipients of federal funds certified by the Commission. No. 92-5214, slip op. at 15.

In the Commission's opinion, First Amendment concerns and the legislative history of the public funding campaign statutes strongly indicate that Congress did not intend Title VI to permit the Commission to dictate to the political parties how to select candidates or to regulate the campaigns of candidates for federal office. Nevertheless, the potential exists for persons immediately prior to an election to invoke Title VI in the federal courts in a manner that might interfere with the parties' nominating process and the candidates'

campaigns. The recommended clarification would help forestall such a possibility.

For these reasons, Congress should consider adding the following language to the end of each public financing provision cited above: "The acceptance of such payments will not cause the recipient to be conducting a 'program or activity receiving federal financial assistance' as that term is used in Title VI of the Civil Rights Act of 1964, as amended."

Deposit of Repayments

Section: 26 U.S.C. §9007(d)

Recommendation: The Commission recommends that Congress revise the law to state that: All payments received by the Secretary of the Treasury under subsection (b) shall be deposited by him or her in the Presidential Election Campaign Fund established by §9006(a).

Explanation: This change would allow the Fund to recapture monies repaid by convention-related committees of national major and minor parties, as well as by general election grant recipients. Currently the Fund recaptures only repayments made by primary matching fund recipients.

Enforcement of Nonwillful Violations

Section: 26 U.S.C. §§9012 and 9042

Recommendation: The Commission recommends that Congress consider amending the Presidential Election Campaign Fund Act and the Presidential Primary Matching Payment Account Act to clarify that the Commission has authority for civil enforcement of nonwillful violations (as well as willful violations) of the public funding provisions.

Explanation: Section 9012 of the Presidential Election Campaign Fund Act and §9042 of the Presidential Primary Matching Payment Account Act provide only for "criminal penalties" for knowing and willful violations of the spending and contribution provisions and the failure of publicly funded candidates to furnish all records requested by the Commission. The lack of a specific reference to nonwillful violations of these provisions has raised questions regarding the Com-

mission's ability to enforce these provisions through the civil enforcement process.

In some limited areas, the Commission has invoked other statutes and other provisions in Title 26 to carry out its civil enforcement of the public funding provisions. It has relied, for example, on 2 U.S.C. §441a(b) to enforce the Presidential spending limits. Similarly, the Commission has used the candidate agreement and certification processes provided in 26 U.S.C. §§9003 and 9033 to enforce the spending limits, the ban on private contributions, and the requirement to furnish records. Congress may wish to consider revising the public financing statutes to provide explicit authority for civil enforcement of these provisions.

Eligibility Requirements for Public Financing (revised 1994)

Section: 26 U.S.C. §§9002, 9003, 9032 and 9033

Recommendation: The Commission recommends that Congress amend the eligibility requirements for publicly funded Presidential candidates to make clear that candidates who have been convicted of a willful violation of the laws related to the public funding process or who are not eligible to serve as President will not be eligible for public funding.

Explanation: Neither of the Presidential public financing statutes expressly restricts eligibility for funding because of a candidate's prior violations of law, no matter how severe. And yet public confidence in the integrity of the public financing system would risk serious erosion if the U.S. Government were to provide public funds to candidates who had been convicted of felonies related to the public funding process. Congress should therefore amend the eligibility requirements to ensure that such candidates do not receive public financing for their Presidential campaigns. The amendments should make clear that a candidate would be ineligible for public funds if he or she had been convicted of fraud with respect to raising funds for a campaign that was publicly financed, or if he or she had failed to make repayments in connection with a past publicly funded campaign or had willfully disregarded the statute or regulations. In addi-

tion, Congress should make it clear that eligibility to serve in the office sought is a prerequisite for eligibility for public funding. See *LaRouche v. FEC*, 992 F.2d 1263 (D.C. Cir. 1993) *cert. denied*, 114 S. Ct. 550 (1993).

Eligibility Threshold for Public Financing (revised 1994)

Section: 26 U.S.C. §§9003 and 9033

Recommendation: The Commission recommends that Congress raise the eligibility threshold for publicly funded Presidential candidates.

Explanation: The Federal Election Commission has administered the public funding provisions in five Presidential elections. The statute provides for a cost-of-living adjustment (COLA) of the overall primary spending limitation. There is, however, no corresponding adjustment to the threshold requirement. It remains exactly the same as it was in 1974. An adjustment to the threshold requirement would ensure that funds continue to be given only to candidates who demonstrate broad national support. To reach this higher threshold, the Commission recommends increasing the number of states in which the candidate had to raise the qualifying amount of matchable contributions; and/or increase the total amount of qualifying matchable contributions that had to be raised in each of the states.

Contributions to Presidential Nominees Who Receive Public Funds in the General Election

Section: 26 U.S.C. §9003

Recommendation: The Commission recommends that Congress clarify that the public financing statutes prohibit the making and acceptance of contributions (either direct or in-kind) to Presidential candidates who receive full public funding in the general election.

Explanation: The Presidential Election Campaign Fund Act prohibits a publicly financed general election candidate from accepting private contributions to defray qualified campaign expenses. 26 U.S.C. §9003(b)(2). The Act does not, however, contain a

parallel prohibition against the *making* of these contributions. Congress should consider adding a section to 2 U.S.C. §441a to clarify that individuals and committees are prohibited from making these contributions.

Fundraising Limitation for Publicly Financed Presidential Primary Campaigns

Section: 2 U.S.C. §§431(9)(B)(vi) and 441a

Recommendation: The Commission recommends that the separate fundraising limitation provided to publicly financed Presidential primary campaigns be combined with the overall limit. Thus, instead of a candidate's having a \$10 million (plus COLA¹) limit for campaign expenditures and a \$2 million (plus COLA) limit for fundraising (20 percent of overall limit), each candidate would have one \$12 million (plus COLA) limit for all campaign expenditures.

Explanation: Campaigns that have sufficient funds to spend up to the overall limit usually allocate some of their expenditures to the fundraising category. These campaigns come close to spending the maximum permitted under both their overall limit and their special fundraising limit. Hence, by combining the two limits, Congress would not substantially alter spending amounts or patterns. For those campaigns which do not spend up to the overall expenditure limit, the separate fundraising limit is meaningless. Many smaller campaigns do not even bother to use it, except in one or two states where the expenditure limit is low, e.g., Iowa and New Hampshire. Assuming that the state limitations are eliminated or appropriately adjusted, this recommendation would have little impact on the election process. The advantages of the recommendation, however, are substantial. They include a reduction in accounting burdens and a simplification in reporting requirements for campaigns, and a reduction in the Commission's auditing task. For example, the Commission would no longer have

¹ Spending limits are increased by the cost-of-living adjustment (COLA), which the Department of Labor calculates annually.

to ensure compliance with the 28-day rule, i.e., the rule prohibiting committees from allocating expenditures as exempt fundraising expenditures within 28 days of the primary held within the state where the expenditure was made.

Registration and Reporting

Consolidated Reporting of Events (1994)

Section: 2 U.S.C. §434(b)

Recommendation: The Commission recommends that Congress consider strengthening disclosure by requiring Presidential committees to identify all receipts from a political fundraising event that grosses over \$50,000 in itemizable receipts. Congress may wish to require committees to file an event schedule, listing all event-related contributions that meet the itemization threshold.

Explanation: Under present law, it is difficult to see the contribution patterns of major fundraising events. More detailed reporting of major fundraising events would give the public an improved picture of how Presidential committees raise campaign funds.

Candidates and Principal Campaign Committees

Section: 2 U.S.C. §§432(e)(1) and 433(a)

Recommendation: The Commission recommends that Congress revise the law to require a candidate and his or her principal campaign committee to register simultaneously.

Explanation: An individual becomes a candidate under the FECA once he or she crosses the \$5,000 threshold in raising contributions or making expenditures. The candidate has 15 days to file a statement designating the principal campaign committee, which will subsequently disclose all of the campaign's financial activity. This committee, in turn, has 10 days from the candidate's designation to register. This schedule allows 25 days to pass before the committee's reporting requirements are triggered. Consequently, the financial activity that occurred prior to the registration is not disclosed until the committee's next upcoming

report. This period is too long during an election year. For example, should a report be due 20 days after an individual becomes a candidate, the unregistered committee would not have to file a report on that date and disclosure would be delayed. The next report might not be filed for 3 more months. By requiring simultaneous registration, the public would be assured of more timely disclosure of the campaign's activity.

PACs Created by Candidates (revised 1994)

Section: 2 U.S.C. §441a(a)

Recommendation: The Commission recommends that Congress consider whether PACs created by candidates should be deemed affiliated with the candidate's principal campaign committee.

Explanation: A number of candidates for federal office, including incumbent officeholders, have created PACs in addition to their principal campaign committees. Under current law, such PACs generally are not considered authorized committees. Therefore, they may accept funds from individuals up to the \$5,000 limit permitted for unauthorized committees in a calendar year and may make contributions of up to \$5,000 per election to other federal candidates once they achieve multicandidate status. In contrast, authorized committees may not accept more than \$1,000 per election from individuals and may not make contributions in excess of \$1,000 to other candidates.

The existence of PACs created by candidates can present difficult issues for the Commission, such as when contributions are jointly solicited with the candidate's principal campaign committee or the resources of the PAC are used to permit the candidate to gain exposure by traveling to appearances on behalf of other candidates. At times the operations of the two committees can be difficult to distinguish.

If Congress concludes that there is an appearance that the limits of the Act are being evaded through the use of PACs created by candidates, it may wish to consider whether such committees are affiliated with the candidate's principal campaign committee. As such, contributions received by the committees would be aggregated under a single contribution limit and

subjected to the limitations on contributions to authorized committees. The same treatment would be accorded to contributions made by them to other candidates.

Campaign-Cycle Reporting

Section: 2 U.S.C. §434

Recommendation: The Commission recommends that Congress revise the law to require authorized candidate committees to report on a campaign-to-date basis, rather than a calendar year cycle, as is now required.

Explanation: Under the current law, a reporter or researcher must compile the total figures from several year-end reports in order to determine the true costs of a committee. In the case of Senate campaigns, which may extend over a six-year period, this change would be particularly helpful.

Monthly Reporting for Congressional Candidates

Section: 2 U.S.C. §434(a)(2)

Recommendation: The Commission recommends that the principal campaign committee of a Congressional candidate have the option of filing monthly reports in lieu of quarterly reports.

Explanation: Political committees, other than principal campaign committees, may choose under the Act to file either monthly or quarterly reports during an election year. Committees choose the monthly option when they have a high volume of activity. Under those circumstances, accounting and reporting are easier on a monthly basis because fewer transactions have taken place during that time. Consequently, the committee's reports will be more accurate.

Principal campaign committees can also have a large volume of receipts and expenditures. This is particularly true with Senatorial campaigns. These committees should be able to choose a more frequent filing schedule so that their reporting covers less activity and is easier to do.

Reporting Deadlines for Semiannual, Year-End and Monthly Filers

Section: 2 U.S.C. §§434(a)(3)(B) and (4)(A) and (B)

Recommendation: The Commission recommends that Congress change the reporting deadline for all semiannual, year-end and monthly filers to 15 days after the close of books for the report.

Explanation: Committees are often confused because the filing dates vary from report to report. Depending on the type of committee and whether it is an election year, the filing date for a report may fall on the 15th, 20th or 31st of the month. Congress should require that monthly, quarterly, semiannual and year-end reports are due 15 days after the close of books of each report. In addition to simplifying reporting procedures, this change would provide for more timely disclosure, particularly in an election year. In light of the increased use of computerized recordkeeping by political committees, imposing a filing deadline of the fifteenth of the month would not be unduly burdensome.

Require Monthly Filing for Certain Multicandidate Committees

Section: 2 U.S.C. §434(a)(4)

Recommendation: The Commission recommends that multicandidate committees which have raised or spent, or which anticipate raising or spending, over \$100,000 be required to file on a monthly basis during an election year.

Explanation: Under current law, multicandidate committees have the option of filing quarterly or monthly during an election year. Quarterly filers that make contributions or expenditures on behalf of primary or general election candidates must also file pre-election reports.

Presidential candidates who anticipate receiving contributions or making expenditures aggregating \$100,000 or more must file on a monthly basis. Congress should consider applying this same reporting requirement to multicandidate committees which have raised or spent, or which anticipate raising or spend-

ing, in excess of \$100,000 during an election year. The requirement would simplify the filing schedule, eliminating the need to calculate the primary filing periods and dates. Filing would be standardized—once a month. This change would also benefit disclosure; the public would know when a committee's report was due and would be able to monitor the larger, more influential committees' reports. Although the total number of reports filed would increase, most reports would be smaller, making it easier for the Commission to enter the data into the computer and to make the disclosure more timely.

Reporting of Last-Minute Independent Expenditures

Section: 2 U.S.C. §434(c)

Recommendation: The Commission recommends that Congress clarify when last-minute independent expenditures must be reported.

Explanation: The statute requires that independent expenditures aggregating \$1,000 or more and made after the 20th day, but more than 24 hours, before an election be *reported* within 24 hours after they are made. This provision is in contrast to other reporting provisions of the statute, which use the words "shall be filed." Must the report be received by the filing office within 24 hours after the independent expenditure is made, or may it be sent certified/registered mail and postmarked within 24 hours of when the expenditure is made? Should Congress decide that committees must report the expenditure within 24 hours after it is made, committees should be able to file via facsimile (fax) machine. (See Legislative Recommendation titled "Facsimile Machines.") Clarification by Congress would be very helpful.

Reporting Last-Minute Coordinated Party Expenditures by Party Committees (1994)

Section: 2 U.S.C. §§434 and 441a(d)

Recommendation: The Commission recommends that Congress consider requiring state and national party committees to file 48-hour notices when they make coordinated expenditures shortly before an election.

Explanation: Party committees must file pre-general election reports when they make contributions or expenditures supporting general election candidates prior to the 19th day before the election. Candidate committees must file 48-hour notices when they receive last-minute contributions prior to the election. Coordinated expenditures made after the close of books of the pre-election report, however, are not disclosed until after the election. In order to disclose this important financial activity, the Commission recommends that Congress consider requiring state and national party committees to file 48-hour notices when they make coordinated expenditures during the period beginning with the close of books of the pre-election report and continuing through 48 hours before the election. The Commission shall receive this notice within 48 hours of the committee making the expenditure.

Facsimile Machines

Section: 2 U.S.C. §§434(b)(6)(B)(iii) and 434(c)(2)

Recommendation: The Commission recommends that Congress modify the Act to provide for the acceptance and admissibility of 24-hour notices of independent expenditures via telephone facsimiles.

Explanation: Independent expenditures that are made between 20 days and 24 hours before an election must be reported within 24 hours. The Act requires that a last-minute independent expenditure report must include a certification, under penalty of perjury, stating whether the expenditure was made "in cooperation, consultation, or concert with, or at the request or suggestion of, any candidate or any authorized committee or agent of such committee." This requirement appears to foreclose the option of using a facsimile machine to file the report. The next report the committee files, however, which covers the reporting period when the expenditure was made, must also include the certification, stating the same information. Given the time constraint for filing the report, the requirement to include the certification on the subsequent report, and the availability of modern technology that would facilitate such a filing, Congress should consider allowing such filings via telephoni-

cally transmitted facsimiles ("fax" machines). This could be accomplished by allowing the committee to fax a copy of the schedule disclosing the independent expenditure and the certification. The original schedule would be filed with the next report. Acceptance of such a filing method would facilitate timely disclosure and simplify the process for the filer.

Waiver Authority

Section: 2 U.S.C. §434

Recommendation: The Commission recommends that Congress give the Commission the authority to adjust the filing requirements or to grant general waivers or exemptions from the reporting requirements of the Act.

Explanation: In cases where reporting requirements are excessive or unnecessary, it would be helpful if the Commission had authority to suspend the reporting requirements of the Act. For example, the Commission has encountered several problems relating to the reporting requirements of authorized committees whose respective candidates were not on the election ballot. The Commission had to consider whether the election-year reporting requirements were fully applicable to candidate committees operating under one of the following circumstances:

- The candidate withdraws from nomination prior to having his or her name placed on the ballot.
- The candidate loses the primary and therefore is not on the general election ballot.
- The candidate is unchallenged and his or her name does not appear on the election ballot.

Unauthorized committees also face unnecessary reporting requirements. For example, the 1992 October Monthly report was due two days before the 12-Day Pre-General Election Report; however the Pre-General Election Report had to be mailed first. A waiver authority would have enabled the Commission to eliminate the requirement to file the monthly report, as long as the committee included the activity in the Pre-General Election Report and filed the report on time. The same disclosure would have been available before the election, but the committee would have only had to file one report.

In other situations, disclosure would be served if the Commission had the authority to adjust the filing requirements, as is currently allowed for special elections. For example, runoff elections are often scheduled shortly after the primary election. In many instances, the close of books for the runoff pre-election report is the day after the primary—the same day that candidates find out if there is to be a runoff and who will participate. When this occurs, the 12-day pre-election report discloses almost no runoff activity. In such a situation, the Commission should have the authority to adjust the filing requirements to allow for a 7-day pre-election report (as opposed to a 12-day report), which would provide more relevant disclosure to the public.

Granting the Commission the authority to waive reports or adjust the reporting requirements would reduce needlessly burdensome disclosure demands.

Reporting and Recordkeeping of Payments to Persons Providing Goods and Services

Section: 2 U.S.C. §§432(c), 434(b)(5)(A), (6)(A) and (6)(B)

Recommendation: The current statute requires reporting "the name and address of each...person to whom an expenditure in an aggregate amount or value in excess of \$200 within the calendar year is made by the reporting committee to meet a candidate or committee operating expense, together with the date, amount, and purpose of such operating expenditure." The Commission recommends that Congress clarify whether this is meant, in all instances, to require reporting committees to disclose only the payments made by the committee or whether additional reporting is required, in some instances, when a payment is made to an intermediary contractor or consultant who, in turn, acts as the committee's agent by making expenditures to other payees. If Congress determines that disclosure of secondary payees is required, the Act should require that committees maintain the name, address, amount and purpose of the disbursement made to the secondary payees in their records and disclose it to the public on their reports. Congress should limit such disclosure to secondary payments

above a certain dollar threshold or to payments made to independent subcontractors.

Explanation: The Commission has encountered on several occasions the question of just how detailed a committee's reporting of disbursements must be. See, e.g., Advisory Opinion 1983-25, 1 Fed. Election Camp. Fin. Guide (CCH), ¶ 5742 (Dec. 22, 1983) (Presidential candidate's committee not required to disclose the names, addresses, dates or amounts of payments made by a general media consultant retained by the committee); Advisory Opinion 1984-8, 1 Fed. Election Camp. Fin. Guide (CCH), ¶ 5756 (Apr. 20, 1984) (House candidate's committee only required to itemize payments made to the candidate for travel and subsistence, not the payments made by the candidate to the actual providers of services); Financial Control and Compliance Manual for Presidential Primary Election Candidates Receiving Public Financing, Federal Election Commission, pp. 123-130 (1992) (distinguishing committee advances or reimbursements to campaign staff for travel and subsistence from other advances or reimbursements to such staff and requiring itemization of payments made by campaign staff only as to the latter). Congressional intent in the area is not expressly stated, and the Commission believes that statutory clarification would be beneficial. In the area of Presidential public financing, where the Commission is responsible for monitoring whether candidate disbursements are for qualified campaign expenses (see 26 U.S.C. §§9004(c) and 9038(b)(2)), guidance would be particularly useful.

Incomplete or False Contributor Information (revised 1994)

Section: 2 U.S.C. §434

Recommendation: The Commission recommends that Congress consider amending the Act to address the recurring problem of committees' inability to provide full disclosure about their contributors.

Explanation: Concern has been expressed by the Commission, the public, and the press about the failure of candidates and political committees to report the addresses and occupations of many of their con-

tributors. While the Commission revised its regulations in 1994 to further ensure that committees make their "best efforts" to obtain and report contributor information, Congress may want to strengthen the law further.

Excluding Political Committees from Protection of the Bankruptcy Code (revised 1994)

Section: 2 U.S.C. §433(d)

Recommendation: The Commission recommends that Congress clarify the distribution of authority over insolvent political committees between the Commission's authority to regulate insolvency and termination of political committees under 2 U.S.C. §433(d), on one hand, and the authority of the bankruptcy courts, on the other hand.

Explanation: In 2 U.S.C. §433(d), the Commission is given authority to establish procedures for "the determination of insolvency" of any political committee, the "orderly liquidation of an insolvent political committee," the "application of its assets for the reduction of outstanding debts," and the "termination of an insolvent political committee after such liquidation..." However, the Bankruptcy Code, 11 U.S.C. §101 *et seq.*, generally grants jurisdiction over such matters to the bankruptcy courts, and at least one bankruptcy court has exercised its jurisdiction under Chapter 11 of the Bankruptcy Code to permit an ongoing political committee to compromise its debts with the intent thereafter to resume its fundraising and contribution and expenditure activities. *In re Fund for a Conservative Majority*, 100 B.R. 307 (Bankr. E.D.Va. 1989). Not only does the exercise of such jurisdiction by the bankruptcy court conflict with the evident intent in 2 U.S.C. §433(d) to empower the Commission to regulate such matters with respect to political committees, but permitting a political committee to compromise debts and then resume its political activities can result in corporate creditors effectively subsidizing the committee's contributions and expenditures, contrary to the intent of 2 U.S.C. §441b(a). The Commission promulgated a regulation generally prohibiting ongoing political committees from compromising outstanding debts, 11 CFR 116.2(b), but the continuing poten-

tial jurisdiction of the bankruptcy courts over such matters could undermine the Commission's ability to enforce it. Accordingly, Congress may want to clarify the distribution of authority between the Commission and the bankruptcy courts in this area. In addition, Congress should specify whether political committees are entitled to seek Chapter 11 reorganization under the Bankruptcy Code.

Use of Campaign Funds

Disposition of Excess Campaign Funds

Section: 2 U.S.C. §439a

Recommendation: In those cases where a candidate has largely financed his campaign with personal funds, the Commission recommends that Congress consider limiting the amount of excess campaign funds that the campaign may transfer to a national, state or local committee of any political party to \$100,000 per year.

Explanation: Under current law, a candidate may transfer unlimited amounts of excess campaign funds to a political party. This makes it possible for a candidate to contribute unlimited personal funds to his campaign, declare these funds excess and transfer them to a political party, thus avoiding the limit on individual contributions to political parties.

Contributions and Expenditures

Contributions and Expenditures to Influence Federal and Nonfederal Elections

Section: 2 U.S.C. §§441 and 434

Recommendation: The Commission recommends that Congress consider whether new legislation is needed to regulate the use of "soft money" in federal elections.

Explanation: The law requires that all funds spent to influence federal elections come from sources that are permissible under the limitations and prohibitions of the Act. Problems arise with the application of this provision to committees that engage in activities that support both federal and nonfederal candidates. The

Commission attempted to deal with this problem by promulgating regulations that required such committees to allocate disbursements between federal and nonfederal election activity. The focus of these regulations was on how the funds were spent. The public, however, has been equally concerned about the source of money that directly or indirectly influences federal politics. Much discussion has centered on the perception that soft money is being used to gain access to federal candidates. ("Soft money" is generally understood to mean funds that do not comply with the federal prohibitions and limits on contributions.) Even if soft money is technically used to pay for the nonfederal portion of shared activities (federal and nonfederal), the public may perceive that the contributors of soft money have undue influence on federal candidates and federally elected officials. In light of this public concern, Congress should consider amending the law in this area as it affects the *raising* of soft money. Such changes could include any or all of the following: (1) more disclosure of nonfederal account receipts (as well as "building fund" proceeds exempted under 2 U.S.C. §431(8)(B)(viii)); (2) limits on nonfederal account donations coupled with tighter affiliation rules regarding party committees; (3) prohibiting nonfederal accounts for certain types of committees; (4) prohibiting the use of a federal candidate's name or appearance to raise soft money; and (5) confining soft money fundraising to nonfederal election years.

In addition, further restrictions on the *spending* of soft money should be considered, such as: (1) requiring all party committees to disclose all nonfederal activity that is not exclusively related to nonfederal candidate support and expressly preempting duplicative state reporting requirements; (2) requiring that all party activity which is not exclusively on behalf of nonfederal candidates be paid for with federally permissible funds; and (3) limiting the use of soft money to nonfederal election year activity.

Broader Prohibition Against Force and Reprisals

Section: 2 U.S.C. §441b(b)(3)(A)

Recommendation: The Commission recommends that Congress revise the FECA to make it unlawful for a corporation, labor organization or separate segre-

gated fund to use physical force, job discrimination, financial reprisals or the threat thereof to obtain a contribution or expenditure on behalf of any candidate or political committee.

Explanation: Current §441b(b)(3)(A) could be interpreted to narrowly apply to the making of contributions or expenditures by a separate segregated fund which were obtained through the use of force, job discrimination, financial reprisals and threats. Thus, Congress should clarify that corporations and labor organizations are prohibited from using such tactics in the solicitation of contributions for the separate segregated fund. In addition, Congress should include language to cover situations where the funds are solicited on behalf of and given directly to candidates.

Use of Free Air Time

Section: 2 U.S.C. §§431(9)(B)(i) and 441b

Recommendation: The Commission recommends that Congress revise the FECA to indicate whether an incorporated broadcaster may donate free air time to a candidate or political committee and, if so, under what conditions and restrictions.

Explanation: The Federal Election Campaign Act prohibits a corporation from providing “anything of value” to a candidate without full payment. However, §§312(a)(7) and 315(b) of the Communications Act require that broadcast stations provide “reasonable access” to federal candidates, and prohibit stations from charging candidates more than the “lowest unit charge” for the same class and amount of time in the same time period. Under FCC rules, broadcasters may satisfy their “reasonable access” obligations by providing free air time to candidates, although the Federal Communications Commission does not require them to provide free time. Therefore, the question has been raised as to whether the donation of free air time by an incorporated broadcaster is a prohibited corporate contribution under the FECA, or whether such a donation comes within the exemption for news stories, commentaries and editorials. The Commission has twice considered and been unable to resolve this issue. Hence, Congress may want to

consider offering guidance on whether donations of free air time are permissible under the FECA and, if so, under what conditions and restrictions.

Distinguishing Official Travel from Campaign Travel

Section: 2 U.S.C. §431(9)

Recommendation: The Commission recommends that Congress amend the FECA to clarify the distinctions between campaign travel and official travel.

Explanation: Many candidates for federal office hold elected or appointed positions in federal, state or local government. Frequently, it is difficult to determine whether their public appearances are related to their official duties or whether they are campaign related. A similar question may arise when federal officials who are not running for office make appearances that could be considered to be related to their official duties or could be viewed as campaign appearances on behalf of specific candidates.

Another difficult area concerns trips in which both official business and campaign activity take place. There have also been questions as to how extensive the campaign aspects of the trip must be before part or all of the trip is considered campaign related. Congress might consider amending the statute by adding criteria for determining when such activity is campaign related. This would assist the committee in determining when campaign funds must be used for all or part of a trip. This will also help Congress determine when official funds must be used under House or Senate Rules.

Coordinated Party Expenditures (revised 1994)

Section: 2 U.S.C. §441a(d)

Recommendation: The Commission recommends that Congress clarify the number of coordinated party expenditure limits that are available to party committees during the election cycle.

In addition, Congress may want to clarify the distinction between coordinated party expenditures made in connection with general elections and generic party building activity.

Explanation: Section 441a(d) provides that national and state party committees may make expenditures in connection with the general election campaigns of the party's nominees for House and Senate. The national party committees may also make such expenditures on behalf of the party's general election Presidential and Vice Presidential nominees. The Commission has interpreted these provisions to permit party committees to make nearly any type of expenditure they deem helpful to their nominees short of donating the funds directly to the candidates. Expenditures made under §441a(d) are subject to a special limit, separate from contribution limits.

The Commission has been faced several times with the question of whether party committees have one or two coordinated party expenditure limits in a particular election campaign. In particular, the issue has been raised in special election campaigns. Some state laws allow the first special election either to narrow the field of candidates, as a primary would, or to fill the vacancy if one candidate receives a majority of the popular vote. If a second special election becomes necessary to fill the vacancy, the question has arisen as to whether the party committees may spend against a second coordinated party expenditure limit since both special elections could have filled the vacancy. In a parallel manner, the Commission has been faced with the question of whether party committees have one or two coordinated party expenditure limits in a situation that includes an election on a general election date and a subsequent election, required by state law, after the general election. Congressional guidance on this issue would be helpful.

Party committees may also make expenditures for generic party-building activities, including get-out-the-vote and voter registration drives. These activities are not directly attributable to a clearly identified candidate. In contrast to coordinated party expenditures, these activities are not subject to limitation.

When deciding, in advisory opinions and enforcement matters, whether an activity is a 441a(d) expenditure or a generic activity, the Commission has considered the timing of the expenditure, the language of the communication, and whether it makes reference only to candidates seeking a particular office or to all the party's candidates, in general. However, the Com-

mission still has difficulty determining, in certain situations, when a communication or other activity is generic party building activity or a coordinated party expenditure. Congressional guidance on this issue would be helpful.

Volunteer Participation in Exempt Activity

Section: 2 U.S.C. §§431(8)(B)(x) and (xii); 431(9)(B)(viii) and (ix)

Recommendation: The Commission recommends that Congress clarify the extent to which volunteers must conduct or be involved in an activity in order for the activity to qualify as an exempt party activity.

Explanation: Under the Act, certain activities conducted by state and local party committees on behalf of the party's candidates are exempt from the contribution limitations if they meet specific conditions. Among these conditions is the requirement that the activity be conducted by volunteers. However, the actual level of volunteer involvement in these activities has varied substantially.

Congress may want to clarify the extent to which volunteers must be involved in an activity in order for that activity to qualify as an exempt activity. For example, if volunteers are assisting with a mailing, must they be the ones to stuff the envelopes and sort the mail by zip code or can a commercial vendor perform that service? Is it sufficient involvement if the volunteers just stamp the envelopes or drop the bags at the post office?

Colleges and Universities

Section: 2 U.S.C. §§441a and 441b

Recommendation: The Commission recommends that Congress consider amending the FECA to spell out the circumstances in which colleges, universities and other educational institutions may engage in political activities such as sponsoring candidate appearances and candidate debates, and conducting voter registration drives.

Explanation: Under 2 U.S.C. §441b, incorporated private educational institutions, like other corpora-

tions, are prohibited from making contributions in connection with any Federal election. Similarly, state-operated educational institutions, if unincorporated, are “persons” and thus subject to the contribution limitations of 2 U.S.C. §441a. Within the existing framework of the FECA, the Commission is currently considering the conditions under which an educational institution may sponsor a candidate appearance or candidate debate or conduct a voter drive, and the conditions under which such activities will constitute in-kind contributions. However, Congress may wish to consider whether the important educational role these institutions play in the democratic process warrants treating them differently from the way other corporations are treated with respect to these or other forms of political activities. The Commission notes that safeguards against certain political activities already exist. For example, under the Internal Revenue Code, private schools that qualify as nonprofit corporations under §501(c)(3) of the Internal Revenue Code may not participate or intervene in political campaigns. Similarly, state-operated schools may be required to ensure that state funds are not used for political purposes.

Direction or Control

Section: 2 U.S.C. §441a(a)(8)

Recommendation: The Commission recommends that Congress consider whether the Act’s provisions regarding earmarked contributions should incorporate the concept in the legislative history that contributions count toward a conduit’s or intermediary’s contribution limits when the conduit or intermediary exercises direction or control over them. If Congress does determine that such contributions count toward a conduit’s or intermediary’s contribution limit, then the Commission recommends that Congress also include a definition of what constitutes direction or control.

Explanation: Under 2 U.S.C. §441a(a)(8), contributions made by any person which are earmarked through a conduit or intermediary to a particular candidate are treated as contributions from that person to the candidate. The Commission has seen an increase in conduit activity in recent years.

Congress has indicated that “if a person exercises any direct or indirect control over the making of a contribution, then such contribution shall count toward the limitation imposed with respect to such person [under current 2 U.S.C. §441a], but it will not count toward such a person’s contribution limitation when it is demonstrated that such person exercised no direct or indirect control over the making of the contribution involved.” H.R. Rep. No. 93–1239, 93d Cong., 2d Sess. 16 (1974). The Commission believes that the FECA should be amended to expressly reflect Congressional intent that contributions count toward a conduit’s limits if the conduit exercises direction or control over the making of those earmarked contributions. In addition, determining what actions on the part of a conduit or intermediary constitute direction or control has presented difficulties for the Commission. Therefore, an amendment to the Act should also include standards for determining when “direction or control” has been exercised over the making of a contribution.

Nonprofit Corporations

Section: 2 U.S.C. §441b

Recommendation: In light of the decision of the U.S. Supreme Court in *FEC v. Massachusetts Citizens for Life, Inc. (MCFL)*, the Commission recommends that Congress consider amending the provision prohibiting corporate and labor spending in connection with federal elections in order to incorporate in the statute the text of the court’s decision. Congress may also wish to include in the Act a definition for the term “express advocacy.”

Explanation: In the Court’s decision of December 15, 1986, the Court held that the Act’s prohibition on corporate political expenditures was unconstitutional as applied to independent expenditures made by a narrowly defined type of nonprofit corporation. The Court also indicated that the prohibition on corporate expenditures for communications is limited to communications expenditures containing express advocacy. Since that time, the Commission has published an Advance Notice of Proposed Rulemaking, and has conducted hearings on whether regulatory changes

are needed as a result of the Court's decision. The Commission sought a second round of public comment following the Court's related decision in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990). More recently, the Commission published a Notice of Proposed Rulemaking and held a second hearing on these issues.

Congress should consider whether statutory changes are needed: (1) to exempt independent expenditures made by certain nonprofit corporations from the statutory prohibition against corporate expenditures; (2) to specify the reporting requirements for these nonprofit corporations; and (3) to provide a definition of express advocacy.

The Court found that certain nonprofit corporations were not subject to the independent expenditure prohibitions of 2 U.S.C. §441b. The Court determined, however, that these nonprofit corporations had to disclose some aspect of their financial activity—in particular, independent expenditures exceeding \$250 and identification of persons who contribute over \$200 to help fund these expenditures. The Court further ruled that spending for political activity could, at some point, become the major purpose of the corporation, and the organization would then become a political committee.

Transfer of Campaign Funds from One Committee to Another

Section: 2 U.S.C. §441a(a)(1) and (5)(C)

Recommendation: The Commission recommends that Congress consider requiring contributors to redesignate contributions before they are transferred from one federal campaign to another federal campaign of the same candidate, and to clarify whether such contributions count against the contributors' limits for the transferee committee.

Explanation: The Commission has traditionally permitted a committee to transfer funds from one campaign to another (e.g., from a 1992 election to a 1994 election committee) without the original contributor's redesignation of the contribution or approval of the transfer. Congress may wish to re-examine whether such transfers are acceptable, and if so, how should

they affect the original contributor's contribution limit vis-à-vis both committees.

Contributions from Minors (revised 1994)

Section: 2 U.S.C. §441a(a)(1)

Recommendation: The Commission recommends that Congress establish a presumption that contributors below age 16 are not making contributions on their own behalf.

Explanation: The Commission has found that contributions are sometimes given by parents in their children's names. Congress should address this potential abuse by establishing a minimum age for contributors, or otherwise provide guidelines ensuring that parents are not making contributions in the name of another.

Application of Contribution Limitations to Family Members

Section: 2 U.S.C. §441a

Recommendation: The Commission recommends that Congress examine the application of the contribution limitations to immediate family members.

Explanation: Under the current posture of the law, a family member is limited to contributing \$1,000 per election to a candidate. This limitation applies to spouses and parents, as well as other immediate family members. (See S. Conf. Rep. No. 93-1237, 93d Cong., 2d Sess., 58 (1974) and *Buckley v. Valeo*, 424 U.S. 1, 51 (footnote 57)(1976).) This limitation has caused the Commission substantial problems in attempting to implement and enforce the contribution limitations.²

Problems have arisen in enforcing the limitations where a candidate uses assets belonging to a parent. In some cases, a parent has made a substantial gift to his or her candidate-child while cautioning the candi-

² While the Commission has attempted through regulations to present an equitable solution to some of these problems (see Final Rule, 48 Fed. Reg. 19019, April 27, 1983, as prescribed by the Commission on July 1, 1983), statutory resolution is required in this area.

date that this may well decrease the amount which the candidate would otherwise inherit upon the death of the parent.

Problems have also occurred in situations where the candidate uses assets held jointly with a spouse. When the candidate uses more than one-half of the value of the asset held commonly with the spouse (for example, offering property as collateral for a loan), the amount over one-half represents a contribution from the spouse. If that amount exceeds \$1,000, it becomes an excessive contribution from the spouse.

The Commission recommends that Congress consider the difficulties arising from application of the contribution limitations to immediate family members.

Lines of Credit and Other Loans Obtained by Candidates

Section: 2 U.S.C. §431(8)(B)(vii)

Recommendation: The Commission recommends that Congress provide guidance on whether candidate committees may accept contributions which are derived from advances on a candidate's brokerage account, credit card, or home equity line of credit, and, if so, Congress should also clarify how such extensions of credit should be reported.

Explanation: The Act currently exempts from the definition of "contribution" loans that are obtained by political committees in the ordinary course of business from federally-insured lending institutions. 2 U.S.C. §431(8)(B)(vii). Loans that do not meet the requirements of this provision are either subject to the Act's contribution limitations, if received from permissible sources, or the prohibition on corporate contributions, as appropriate.

Since this aspect of the law was last amended in 1979, however, a variety of financial options have become more widely available to candidates and committees. These include a candidate's ability to obtain advances against the value of a brokerage account, to draw cash advances from a candidate's credit card, or to make draws against a home equity line of credit obtained by the candidate. In many cases, the credit approval, and therefore the check performed by the lending institution regarding the candidate's creditworthiness, may predate the

candidate's decision to seek federal office. Consequently, the extension of credit may not have been made in accordance with the statutory criteria such as the requirement that a loan be "made on a basis which assures repayment." In other cases, the extension of credit may be from an entity that is not a federally-insured lending institution. The Commission recommends that Congress clarify whether these alternative sources of financing are permissible and, if so, should specify standards to ensure that these advances are commercially reasonable extensions of credit.

Honorarium

Section: 2 U.S.C. §431(8)(B)(xiv)

Recommendation: The Commission recommends that Congress should make a technical amendment, deleting 2 U.S.C. §431(8)(B)(xiv), now contained in a list of definitions of what is not a contribution.

Explanation: The 1976 amendments to the Federal Election Campaign Act gave the Commission jurisdiction over the acceptance of honoraria by all federal officeholders and employees. 2 U.S.C. §441i. In 1991, the Legislative Branch Appropriations Act repealed §441i. As a result, the Commission has no jurisdiction over honorarium transactions taking place after August 14, 1991, the effective date of the law.

To establish consistency within the Act, the Commission recommends that Congress make a technical change to §431(8)(B)(xiv) deleting the reference to honorarium as defined in former §441i. This would delete honorarium from the list of definitions of what is not a contribution.

Application of \$25,000 Annual Limit

Section: 2 U.S.C. §441a(a)(3)

Recommendation: The Commission recommends that Congress consider modifying the provision that limits individual contributions to \$25,000 per calendar year so that an individual's contributions count against his or her annual limit for the year in which they are made.

Explanation: Section 441a(a)(3) now provides that a contribution to a candidate made in a nonelection year counts against the individual donor's limit for the year in which the candidate's election is held. This provision has led to some confusion among contributors. For example, a contributor wishing to support Candidate Smith in an election year contributes to her in November of the year before the election. The contributor assumes that the contribution counts against his limit for the year in which he contributed. Unaware that the contribution actually counts against the year in which Candidate Smith's election is held, the contributor makes other contributions during the election year and inadvertently exceeds his \$25,000 limit. By requiring contributions to count against the limit of the calendar year in which the donor contributes, confusion would be eliminated and fewer contributors would inadvertently violate the law. The change would offer the added advantage of enabling the Commission to better monitor the annual limit. Through the use of our data base, we could more easily monitor contributions made by one individual regardless of whether they were given to retire the debt of a candidate's previous campaign, to support an upcoming election (two, four or six years in the future) or to support a PAC or party committee. Such an amendment would not alter the per candidate, per election limits. Nor would it affect the total amount that any individual could contribute in connection with federal elections.

Election Period Limitations

Section: 2 U.S.C. §441a

Recommendation: The Commission recommends that limits on contributions to candidates be placed on an election-cycle basis, rather than the current per-election basis.

Explanation: The contribution limitations affecting contributions to candidates are structured on a "per-election" basis, thus necessitating dual bookkeeping or the adoption of some other method to distinguish between primary and general election contributions. The Act could be simplified by changing the contribution limitations from a "per-election" basis to an "elec-

tion-cycle" basis. Thus, multicandidate committees could give up to \$10,000 and all other persons could give up to \$2,000 to an authorized committee at any point during the election cycle.

Acceptance of Cash Contributions

Section: 2 U.S.C. §441g

Recommendation: The Commission recommends that Congress modify the statute to make the treatment of 2 U.S.C. §441g, concerning cash contributions, consistent with other provisions of the Act. As currently drafted, 2 U.S.C. §441g prohibits only the *making* of cash contributions which, in the aggregate, exceed \$100 per candidate, per election. It does not address the issue of *accepting* cash contributions. Moreover, the current statutory language does not plainly prohibit cash contributions in excess of \$100 to political committees other than authorized committees of a candidate.

Explanation: Currently this provision focuses only on persons making the cash contributions. However, these cases generally come to light when a committee has accepted these funds. Yet the Commission has no recourse with respect to the committee in such cases. This can be a problem, particularly where primary matching funds are received on the basis of such contributions.

While the Commission, in its regulations at 11 CFR 110.4(c)(2), has included a provision requiring a committee receiving such a cash contribution to promptly return the excess over \$100, the statute does not explicitly make acceptance of these cash contributions a violation. The other sections of the Act dealing with prohibited contributions (i.e., §§ 441b on corporate and labor union contributions, 441c on contributions by government contractors, 441e on contributions by foreign nationals, and 441f on contributions in the name of another) all prohibit both the making and accepting of such contributions.

Secondly, the statutory text seems to suggest that the prohibition contained in §441g applies only to those contributions given to candidate committees. This language is at apparent odds with the Commission's understanding of the Congressional purpose to

prohibit any cash contributions which exceed \$100 in federal elections.

Independent Expenditures by Principal Campaign Committees

Section: 2 U.S.C. §432(e)(3)

Recommendation: The Commission recommends that Congress consider amending the definition of principal campaign committee to clarify whether these committees may make independent expenditures on behalf of other principal campaign committees.

Explanation: A principal campaign committee is defined as an authorized committee which has not supported more than one federal candidate. It is not clear, however, whether the term “support” is intended to include both contributions and independent expenditures or whether it refers to contributions alone. The same section states that the term “support” does not include a contribution by any authorized committee to another authorized committee of \$1,000 or less (2 U.S.C. §432(e)(3)(B)), but it is silent on the question of independent expenditures. The current language does not clearly indicate whether authorized committees can make independent expenditures on behalf of other committees, or whether Congress intended to preclude authorized committees from making independent expenditures.

Certification of Voting Age Population Figures and Cost-of-Living Adjustment

Section: 2 U.S.C. §441a(c) and (e)

Recommendation: The Commission recommends that Congress consider removing the requirement that the Secretary of Commerce certify to the Commission the voting age population of each Congressional district. At the same time, Congress should establish a deadline of February 15 for supplying the Commission with the remaining information concerning the voting age population for the nation as a whole and for each state. In addition, the same deadline should apply to the Secretary of Labor, who is required under the Act to provide the Commission with figures on the annual adjustment to the cost-of-living index.

Explanation: In order for the Commission to compute the coordinated party expenditure limits and the state-by-state expenditure limits for Presidential candidates, the Secretary of Commerce certifies the voting age population of the United States and of each state. 2 U.S.C. §441a(e). The certification for each Congressional district, also required under this provision, is not needed.

In addition, under 2 U.S.C. §441a(c), the Secretary of Labor is required to certify the annual adjustment in the cost-of-living index. In both instances, the timely receipt of these figures would enable the Commission to inform political committees of their spending limits early in the campaign cycle. Under present circumstances, where no deadline exists, the Commission has sometimes been unable to release the spending limit figures before June.

Compliance

Candidate Liability (1994)

Section: 2 U.S.C. §§432(e)(2) and 437g

Recommendation: The Commission recommends that Congress review who is liable for committee obligations to pay civil penalties for violations of the FECA. Congress may want to include in this review whether candidates should be jointly and severally liable for civil penalties incurred by their campaign committees.

Explanation: In enforcement cases, the Commission proceeds against both committees and their treasurers because the treasurers are responsible for complying with most requirements of the FECA. In many cases, civil penalties are paid from the principal campaign committee's funds. Because committees may change treasurers several times before a matter is resolved, and it may be very difficult to locate the individual who was treasurer at the time the violation occurred, the Commission generally proceeds against the individual who is currently treasurer at the time of the enforcement matter. This can place a large burden on those who agree to become treasurers, particularly when the campaign committee does not have sufficient funds to pay the civil penalty. Treasurers

may be held jointly and severally liable for civil penalties, even in situations where the preparation and review of the reports was done by an assistant treasurer, bookkeeper, or other individual. Treasurers' liability may also make it more difficult for candidates to find individuals who are willing to serve as treasurers for their campaign committees.

While the Commission does make findings against candidates when they are directly involved in the activities that constitute a violation, it does not do so absent such involvement. Under 2 U.S.C. §432(e)(2), candidates are agents of their campaign committees for purposes of receiving contributions and loans, and making disbursements. This statutory provision implies that the candidate is not the principal of the committee, and is therefore not responsible for committee actions absent personal involvement. Accordingly, Congress may want to review whether it would be preferable for liability to be placed on the current treasurer, or the treasurer at the time of the violation, or the candidate.

Persons Who Can Be Named As Respondents

Section: 2 U.S.C. §§434(a)(1), 441a(f), 441b and 441f

Recommendation: The Commission recommends that Congress consider amending the enforcement provisions of the Act to include a section that makes it a violation for anyone to actively assist another party in violating the Act.

Explanation: Many sections of the Act specifically list the parties that can be found in violation of those sections. See, e.g., 2 U.S.C. §§434(a)(1), 441a(f), 441b, 441f. Oftentimes, however, parties other than those listed are actively involved in committing the violations. For example, §441b makes it illegal for an officer or director of a corporation, national bank or labor union to consent to the making of a contribution prohibited under that section. The Commission has seen many instances where these types of organizations have made prohibited contributions which were consented to by individuals who have the authority to

approve the making of the contributions, even though those individuals did not hold the titles listed in the statute.

This issue has also been addressed on a limited basis in the context of 2 U.S.C. §441f. That section prohibits anyone from making or knowingly accepting a contribution made in the name of another, or from knowingly allowing his/her name to be used to effect such a contribution. In many situations involving this section, there are additional parties, not specified in the statute, who are actively involved in carrying out the violation. Without an "assisting" standard, those active participants cannot be found to have violated that section. The court has recognized such a standard with regard to §441f, *FEC v. Rodriguez*, No. 86-687 Civ-T-10(B) (M.D. Fla. May 5, 1987)(unpublished order denying motion for summary judgment), and the Commission has reflected that decision in its regulations at 11 CFR 110.4.

Although these actions have provided a basis for pursuing additional violators in a limited context, the preferable approach would be to codify the explicit statutory authority to pursue those who actively assist in carrying out all types of violations.

Enhancement of Criminal Provisions

Section: 2 U.S.C. §§437g(a)(5)(C) and 437g(d)

Recommendation: The Commission recommends that it have the ability to refer appropriate matters to the Justice Department for criminal prosecution at any stage of a Commission proceeding.

Explanation: The Commission has noted an upsurge of §441f contribution reimbursement schemes, that may merit heavy criminal sanction. Although there is no prohibition preventing the Department of Justice from initiating criminal FECA prosecutions on its own, the vehicle for the Commission to bring such matters to the Department's attention is found at §437g(a)(5)(C), which provides for referral only after the Commission has found probable cause to believe

that a criminal violation of the Act has taken place.³ Thus, even if it is apparent at an early stage that a case merits criminal referral, the Commission must pursue the matter to the probable cause stage before referring it to the Department for criminal prosecution. To conserve the Commission's resources, and to allow the Commission to bring potentially criminal FECA violations to the Department's attention at the earliest possible time, the Commission recommends that consideration be given to explicitly empower the Commission to refer apparent criminal FECA violations to the Department at any stage in the enforcement process.

Audits for Cause

Section: 2 U.S.C. §438(b)

Recommendation: The Commission recommends that Congress expand the time frame, from 6 months to 12 months after the election, during which the Commission can initiate an audit for cause.

Explanation: Under current law, the Commission must initiate audits for cause within 6 months after the election. Because year-end disclosure does not take place until almost 2 months after the election, and because additional time is needed to computerize campaign finance information and review reports, there is little time to identify potential audits and complete the referral process within that 6-month window.

Random Audits

Section: 2 U.S.C. §438(b)

Recommendation: The Commission recommends that Congress consider legislation that would require the Commission to randomly audit political committees in an effort to promote voluntary compliance with the election law and ensure public confidence in the election process.

Explanation: In 1979, Congress amended the FECA to eliminate the Commission's explicit authority to conduct random audits. The Commission is concerned that this change has weakened its ability to deter abuse of the election law. Random audits can be an effective tool for promoting voluntary compliance with the Act and, at the same time, reassuring the public that committees are complying with the law. Random audits performed by the IRS offer a good model. As a result of random tax audits, most taxpayers try to file accurate returns on time. Tax audits have also helped create the public perception that tax laws are enforced.

There are many ways to select committees for a random audit. One way would be to randomly select committees from a pool of all types of political committees identified by certain threshold criteria such as the amount of campaign receipts and, in the case of candidate committees, the percentage of votes won. With this approach, audits might be conducted in many states throughout the country.

Another approach would be to randomly select several Congressional districts and audit all political committees in those districts (with the exception of certain candidates whose popular vote fell below a certain threshold) for a given election cycle. This system might result in concentrating audits in fewer geographical areas.

Such audits should be subject to strict confidentiality rules. Only when the audits are completed should they be published and publicized. Committees with no problems should be commended.

Regardless of how random selections were made, it would be essential to include all types of political committees—PACs, party committees and candidate committees—and to ensure an impartial, evenhanded selection process.

³The Commission has the general authority to report apparent violations to the appropriate law enforcement authority (see 2 U.S.C. §437d(a)(9)), but read together with §437g, §437d(a)(9) has been interpreted by the Commission to refer to violations of law unrelated to the Commission's FECA jurisdiction.

Modifying Standard of “Reason to Believe” Finding

Section: 2 U.S.C. §437g

Recommendation: The Commission recommends that Congress modify the language pertaining to “reason to believe,” contained at 2 U.S.C. §437g, so as to allow the Commission to open an investigation with a sworn complaint, or after obtaining evidence in the normal course of its supervisory responsibilities. Essentially, this would change the “reason to believe” standard to “reason to open an investigation.”

Explanation: Under the present statute, the Commission is required to make a finding that there is “reason to believe a violation has occurred” before it may investigate. Only then may the Commission request specific information from a respondent to determine whether, in fact, a violation has occurred. The statutory phrase “reason to believe” is misleading and does a disservice to both the Commission and the respondent. It implies that the Commission has evaluated the evidence and concluded that the respondent has violated the Act. In fact, however, a “reason to believe” finding simply means that the Commission believes a violation may have occurred if the facts as described in the complaint are true. An investigation permits the Commission to evaluate the validity of the facts as alleged.

It would therefore be helpful to substitute words that sound less accusatory and that more accurately reflect what, in fact, the Commission is doing at this early phase of enforcement.

In order to avoid perpetuating the erroneous conclusion that the Commission believes a respondent has violated the law every time it finds “reason to believe,” the statute should be amended.

Expedited Enforcement Procedures and Injunctive Authority

Section: 2 U.S.C. §437g

Recommendation: The Commission recommends that Congress consider whether the FECA should provide for expedited enforcement of complaints filed shortly before an election, permit injunctive relief in certain

cases, and allow the Commission to adopt expedited procedures in such instances.⁴

Explanation: The statute now requires that before the Commission proceeds in a compliance matter it must wait 15 days after notifying any potential respondent of alleged violations in order to allow that party time to file a response. Furthermore, the Act mandates extended time periods for conciliation and response to recommendations for probable cause. Under ordinary circumstances such provisions are advisable, but they are detrimental to the political process when complaints are filed immediately before an election. In an effort to avert intentional violations that are committed with the knowledge that sanctions cannot be enforced prior to the election and to quickly resolve matters for which Commission action is not warranted, Congress

⁴ Commissioner Elliott filed the following dissent:

The Act presently enables the Commission to seek injunctive relief after the administrative process has been completed and this is more than sufficient. (See 2 U.S.C. §437g(a)(6)(A).)

I am unaware of any complaint filed with the Commission which, in my opinion, would meet the four standards set forth in the legislative recommendations. Assuming a case was submitted which met these standards, I believe it would be inappropriate for the Commission to seek injunctive relief prior to a probable cause finding.

First, the very ability of the Commission to seek an injunction, especially during the “heat of the campaign,” opens the door to allegations of an arbitrary and politically motivated enforcement action by the Commission. The Commission’s decision to seek injunction in one case while refusing to do so in another could easily be seen by candidates and respondents as politicizing the enforcement process.

Second, the Commission might easily be flooded with requests for injunctive relief for issues such as failure to file an October quarterly or a 12-day pre-general report. Although the Commission would have the discretion to deny all these requests for injunctive relief, in making that decision the Commission would bear the administrative burden of an immediate review of the factual issues.

Third, although the courts would be the final arbiter as to whether or not to grant an injunction, the mere decision by the Commission to seek an injunction during the final weeks of a campaign would cause a diversion of time and money and adverse publicity for a candidate during the most important period of the campaign.

For these reasons, I disagree with the recommendation to expand the power of the Commission to seek injunctive relief except as presently provided for the Act.

should consider granting the Commission some discretion to deal with such situations on a timely basis.

Even when the evidence of a violation has been clear and the potential impact on a campaign has been substantial, without the authority to initiate a civil suit for injunctive relief, the Commission has been unable to act swiftly and effectively in order to prevent a violation. The Commission has felt constrained from seeking immediate judicial action by the requirement of the statute that conciliation be attempted before court action is initiated, and the courts have indicated that the Commission has little if any discretion to deviate from the administrative procedures of the statute. *In re Carter-Mondale Reelection Committee, Inc.*, 642 F.2d 538 (D.C. Cir. 1980); *Common Cause v. Schmitt*, 512 F. Supp. 489 (D.D.C. 1980), *aff'd by an equally divided court*, 455 U.S. 129 (1982); *Durkin for U.S. Senate v. FEC*, 2 Fed. Election Camp. Fin. Guide (CCH) ¶ 9147 (D.N.H. 1980). If Congress allows for expedited handling of compliance matters, it should authorize the Commission to implement changes in such circumstances to expedite its enforcement procedures. As part of this effort, Congress should consider whether the Commission should be empowered to promptly initiate a civil suit for injunctive relief in order to preserve the status quo when there is clear and convincing evidence that a substantial violation of the Act is about to occur. Congress should consider whether the Commission should be authorized to initiate such civil action in a United States district court, under expressly stated criteria, without awaiting expiration of the 15-day period for responding to a complaint or the other administrative steps enumerated in the statute. The person against whom the Commission brings the action would enjoy the procedural protections afforded by the courts.

The Commission suggests the following legislative standards to govern whether it may seek prompt injunctive relief:

1. The complaint sets forth facts indicating that a potential violation of the Act is occurring or will occur;
2. Failure of the Commission to act expeditiously will result in irreparable harm to a party affected by the potential violation;
3. Expeditious action will not result in undue harm or prejudice to the interests of other persons; and

4. The public interest would be served by expeditious handling of the matter.

Protection for Those Who File Complaints or Give Testimony

Section: 2 U.S.C. §437g

Recommendation: The Commission recommends that the Act be amended to make it unlawful to improperly discriminate against employees or union members solely for filing charges or giving testimony under the statute.

Explanation: The Act requires that the identity of anyone filing a complaint with the Commission be provided to the respondent. In many cases, this may put complainants at risk of reprisals from the respondent, particularly if an employee or union member files a complaint against his or her employer or union. This risk may well deter many people from filing complaints, particularly under §441b. *See, e.g., NLRB v. Robbins Tire & Rubber Company*, 437 U.S. 214, 240 (1978); *Brennan v. Engineered Products, Inc.*, 506 F.2d 299, 302 (8th Cir. 1974); *Texas Industries, Inc. v. NLRB*, 336 F.2d 128, 134 (5th Cir. 1964). In other statutes relating to the employment relationship, Congress has made it unlawful to discriminate against employees for filing charges or giving testimony under the statute. *See, e.g.,* 29 U.S.C. §158(a)(4) (National Labor Relations Act); 29 U.S.C. §215(3) (Fair Labor Standards Act); 42 U.S.C. §2000e-3(a) (Equal Employment Opportunity Act). The Commission recommends that Congress consider including a similar provision in the FECA.

Litigation

Ensuring Independent Authority of FEC in All Litigation (revised 1994)

Section: 2 U.S.C. §§437c(f)(4) and 437g

Recommendation: Congress has granted the Commission authority to conduct its own litigation independent of the Department of Justice. This independence is an important component of the statutory structure

designed to ensure nonpartisan administration and enforcement of the campaign financing statutes. The Commission recommends that Congress make the following four clarifications that would help solidify the statutory structure:

1. Congress should amend the Act to specify that local counsel rules (requiring district court litigants to be represented by counsel located within the district) cannot be applied to the Commission.

2. Congress should give the Commission explicit authorization to appear as an *amicus curiae* in cases that affect the administration of the Act, but do not arise under it.

3. Congress should require the United States Marshal's Service to serve process, including summonses and complaints, on behalf of and at no expense to the Federal Election Commission.

4. Congress should also clarify that the Commission is explicitly authorized to petition the Supreme Court for *certiorari* under Title 2, i.e., to conduct its Supreme Court litigation.

Explanation: With regard to the first of these recommendations, most district courts have rules requiring that all litigants be represented by counsel located within the district. The Commission, which conducts all of its litigation nationwide from its offices in Washington, D.C., is unable to comply with those rules without compromising its independence by engaging the local United States Attorney to assist in representing it in courts outside of Washington, D.C. Although most judges have been willing to waive applying these local counsel rules to the Commission, some have insisted that the Commission obtain local representation. An amendment to the statute specifying that such local counsel rules cannot be applied to the Commission would eliminate this problem.

Concerning the second recommendation, the FECA explicitly authorizes the Commission to "appear in and defend against any action instituted under this Act," 2 U.S.C. §437c(f)(4), and to "initiate...defend...or appeal any civil action...to enforce the provisions of this Act and chapter 95 and chapter 96 of title 26," 2 U.S.C. §437d(a)(6). These provisions do not explicitly cover instances in which the Commission appears as

an *amicus curiae* in cases that affect the administration of the Act, but do not arise under it. A clarification of the Commission's role as an *amicus curiae* would remove any questions concerning the Commission's authority to represent itself in this capacity.

Concerning the third recommendation, prior to its amendment effective December 1, 1993, Rule 4(c)(B) of the Federal Rules of Civil Procedure provided that a summons and complaint shall be served by the United States Marshal's Service on behalf of the United States or an officer or agency of the United States. Rule 4, as now amended, requires all plaintiffs, including federal government plaintiffs such as the Commission, to seek and obtain a court order directing that service of process be effected by the United States Marshal's Service. Given that the Commission must conduct litigation nationwide from its offices in Washington, D.C., it is burdensome and expensive for it to enlist the aid of a private process server or, in the alternative, seek relief from the court, in every case in which it is a plaintiff. Returning the task of serving process for the Commission to the United States Marshal's Service would alleviate this problem and assist the Commission in carrying out its mission.

The final recommendation is to clarify that the Commission is explicitly authorized to petition the Supreme Court for *certiorari* under Title 2 and conduct its Supreme Court litigation. The Commission explicitly has this authority under Title 26 and has long-standing practice of doing so under Title 2. However, the Title 2 language would be revised to more clearly state the Commission's authority in the area.

Disclaimers

Fundraising Projects Operated by Unauthorized Committees (revised 1994)

Section: 2 U.S.C §432(e)

Recommendation: The Commission recommends that Congress specifically require that contributions solicited by an unauthorized committee (i.e., a committee that has not been authorized by a candidate as his/her campaign committee) be made payable to the

registered name of the committee and that unauthorized committees be prohibited from accepting checks payable to any other name.

Explanation: Unauthorized committees are not permitted to use the name of a federal candidate in their name or in the name of a fundraising project. However, unauthorized committees (those not authorized by candidates) often raise funds through fundraising efforts that name specific candidates. As a result, contributors are sometimes confused or misled, believing that they are contributing to a candidate's authorized committee when, in fact, they are giving to the nonauthorized committee that sponsors the event. This confusion sometimes leads to requests for refunds, allegations of coordination and inadequate disclaimers, and inability to monitor contributor limits. Contributor awareness might be enhanced if Congress were to modify the statute by requiring that all checks intended for an unauthorized committee be made payable to the registered name of the unauthorized committee and by prohibiting unauthorized committees from accepting checks payable to any other name.

Disclaimer Notices

Section: 2 U.S.C. §441d

Recommendation: The Commission recommends that Congress revise the FECA to require registered political committees to display the appropriate disclaimer notice (when practicable) in any communication issued to the general public, regardless of its content or how it is distributed. Congress should also revise the Federal Communications Act to make it consistent with the FECA's requirement that disclaimer notices state who paid for the communication.

Explanation: Under 2 U.S.C. §441d, a disclaimer notice is only required when "expenditures" are made for two types of communications made through "public political advertising": (1) communications that solicit contributions and (2) communications that "expressly advocate" the election or defeat of a clearly identified candidate. The Commission has encountered a number of problems with respect to this requirement.

First, the statutory language requiring the disclaimer notice refers specifically to "expenditures," suggesting that the requirement does not apply to disbursements that are exempt from the definition of "expenditure" such as "exempt activities" conducted by local and state party committees under, for example, 2 U.S.C. §431(9)(B)(viii). This proposal would make clear that all types of communications to the public would carry a disclaimer.

Second, the Commission has encountered difficulties in interpreting "public political advertising," particularly when volunteers have been involved with the preparation or distribution of the communication.

Third, the Commission has devoted considerable time to determining whether a given communication in fact contains "express advocacy" or "solicitation" language. The recommendation here would erase this need.

Most of these problems would be eliminated if the language of 2 U.S.C. §441d were simplified to require a registered committee to display a disclaimer notice whenever it communicated to the public, regardless of the purpose of the communication and the means of preparing and distributing it. The Commission would no longer have to examine the content of communications or the manner in which they were disseminated to determine whether a disclaimer was required.

This proposal is not intended to eliminate exemptions for communications appearing in places where it is inconvenient or impracticable to display a disclaimer.

Finally, Congress should change the sponsorship identification requirements found in the Federal Communications Act to make them consistent with the disclaimer notice requirements found in the FECA. Under the Communications Act, federal political broadcasts must contain an announcement that they were furnished to the licensee, and by whom. See FCC and FEC Joint Public Notice, FCC 78-419 (June 19, 1978). In contrast, FECA disclaimer notices focus on who authorized and paid for the communication. The Communications Act should be revised to ensure that the additional information required by the FECA is provided without confusion to licensees and political advertisers. In addition, the FECA should be

amended to require that the disclaimer appear at the end of all broadcast communications.

Fraudulent Solicitation of Funds

Section: 2 U.S.C. §441h

Recommendation: The current §441h prohibits fraudulent misrepresentation such as speaking, writing or acting on behalf of a candidate or committee on a matter which is damaging to such candidate or committee. It does not, however, prohibit persons from fraudulently soliciting contributions. The Commission recommends that a provision be added to this section prohibiting persons from fraudulently misrepresenting themselves as representatives of candidates or political parties for the purpose of soliciting contributions which are not forwarded to or used by or on behalf of the candidate or party.

Explanation: The Commission has received a number of complaints that substantial amounts of money were raised fraudulently by persons or committees purporting to act on behalf of candidates. Candidates have complained that contributions which people believed were going for the benefit of the candidate were diverted for other purposes. Both the candidates and the contributors were harmed by such diversion. The candidates received less money because people desirous of contributing believed they had already done so, and the contributors' funds had been misused in a manner in which they did not intend. The Commission has been unable to take any action on these matters because the statute gives it no authority in this area.

Public Disclosure

Computer Filing of Reports

Section: 2 U.S.C. §432(g)

Recommendation: The Commission recommends that Congress consider developing guidelines for when committees should file reports via computer technology. For example, Congress could require that committees maintaining their records on computer make them available to the Commission on suitable computer disk, tape or other appropriate electronic form.

Explanation: While some small committees do not maintain computerized reporting due to the expense, the vast majority facilitate their reporting obligations with computers. Direct transfer of these reports to the Commission would provide a financial savings to the Commission because less staff time would be needed to input the campaign finance information. At the same time, it would ensure full disclosure.

Congress should consider, however, that the Clerk of the House and the Secretary of the Senate are the points of entry for House and Senate reports. Currently, none of the entry points are capable of accepting electronic filings. Should this recommendation be adopted, the Clerk of the House and the Secretary of the Senate, in addition to the Commission, would be required to purchase this technology. Alternatively, the Commission would have to be made the point of entry for such filers.

Commission as Sole Point of Entry for Disclosure Documents

Section: 2 U.S.C. §432(g)

Recommendation: The Commission recommends that it be the sole point of entry for all disclosure documents filed by federal candidates and political committees. This would affect the House and Senate candidate committees only. Under current law, those committees alone file their reports with the Clerk of the House and the Secretary of the Senate, respectively, who then forward microfilmed copies to the FEC.

Explanation: The Commission has offered this recommendation for many years. The experience of handling the year-end report (filed in January 1992) provides an excellent illustration of why a single point of entry is desirable. Some 234 reports filed by House and Senate candidate committees were mistakenly filed with the Federal Election Commission instead of with the Clerk of the House and the Secretary of the Senate. Consequently, every day, for two weeks around the filing deadline, the FEC shipped back to the Clerk and the Secretary packages filled with House and Senate reports that were filed with the

FEC in error. The result? Disclosure to the public was delayed, and government resources were wasted.

Moreover, if the FEC received the original report, it could use it directly for data entry, as it now uses the reports filed by PACs, party committees and Presidential committees.

Should Congress decide to codify the previous recommendation on computerized reports, the Commission should become the sole point of entry to process these reports, avoiding the need for all three offices to obtain the technology necessary to accept electronic filings.

We also reiterate here the statement we have made in previous years because it remains valid. A single point of entry for all disclosure documents filed by political committees would eliminate any confusion about where candidates and committees are to file their reports. It would assist committee treasurers by having one office where they would file reports, address correspondence and ask questions. At present, conflicts may arise when more than one office sends out materials, makes requests for additional information and answers questions relating to the interpretation of the law. A single point of entry would also reduce the costs to the federal government of maintaining three different offices, especially in the areas of personnel, equipment and data processing.

The Commission has authority to prepare and publish lists of nonfilers. It is extremely difficult to ascertain who has and who has not filed when reports may have been filed at or are in transit between two different offices. Separate points of entry also make it difficult for the Commission to track responses to compliance notices. Many responses and/or amendments may not be received by the Commission in a timely manner, even though they were sent on time by the candidate or committee. The delay in transmittal between two offices sometimes leads the Commission to believe that candidates and committees are not in compliance. A single point of entry would eliminate this confusion.

Finally, the Commission notes that the report of the Institute of Politics of the John F. Kennedy School of Government at Harvard University, *An Analysis of the Impact of the Federal Election Campaign Act, 1972-*

78, prepared for the House Administration Committee, recommended that all reports be filed directly with the Commission (Committee Print, 96th Cong., 1st Sess., at 122 (1979)).

Public Disclosure at State Level

Section: 2 U.S.C. §439

Recommendation: The Commission recommends that Congress consider relieving both political committees (other than candidate committees) and state election offices of the burdens inherent in the current requirement that political committees file copies of their reports with the Secretaries of State. One way this could be accomplished is by providing a system whereby the Secretary of State (or equivalent state officer) would tie into the Federal Election Commission's computerized disclosure data base.

Explanation: At the present time, multicandidate political committees are required to file copies of their reports (or portions thereof) with the Secretary of State in each of the states in which they support a candidate. State election offices carry a burden for storing and maintaining files of these reports. At the same time, political committees are burdened with the responsibility of making multiple copies of their reports and mailing them to the Secretaries of State.

With advances in computer technology, it is now possible to facilitate disclosure at the state level without requiring duplicate filing. Instead, state election offices would tie into the FEC's computer data base. The local press and public could access reports of local political committees through a computer hookup housed in their state election offices. All parties would benefit: political committees would no longer have to file duplicate reports with state offices; state offices would no longer have to provide storage and maintain files; and the FEC could maximize the cost effectiveness of its existing data base and computer system.

Such a system has already been tested in a pilot program and proven inexpensive and effective. Initially, we would propose that candidate committees and in-state party committees continue to file their reports both in Washington, D.C., and in their home

states, in response to the high local demand for this information. Later, perhaps with improvements in information technology, the computerized system could embrace these committees as well.

State Filing for Presidential Candidate Committees

Section: 2 U.S.C. §439

Recommendation: The Commission recommends that Congress consider clarifying the state filing provisions for Presidential candidate committees to specify which particular parts of the reports filed by such committees with the FEC should also be filed with states in which the committees make expenditures. Consideration should be given to both the benefits and the costs of state disclosure.

Explanation: Both states and committees have inquired about the specific requirements for Presidential candidate committees when filing reports with the states. The statute requires that a copy of the FEC reports shall be filed with all states in which a Presidential candidate committee makes expenditures. The question has arisen as to whether the full report should be filed with the state, or only those portions that disclose financial transactions in the state where the report is filed.

The Commission has considered two alternative solutions. The first alternative is to have Presidential candidate committees file, with each state in which they have made expenditures, a copy of the entire report filed with the FEC. This alternative enables local citizens to examine complete reports filed by candidates campaigning in a state. It also avoids reporting dilemmas for candidates whose expenditures in one state might influence a primary election in another.

The second alternative is to require that reports filed with the states contain all summary pages and only those receipts and disbursements schedules that show transactions pertaining to the state in which a report is filed. This alternative would reduce filing and storage burdens on Presidential candidate committees and states. It would also make state filing requirements for Presidential candidate committees

similar to those for unauthorized political committees. Under this approach, any person still interested in obtaining copies of a full report could do so by contacting the Public Disclosure Division of the FEC.

Agency Funding

Statutory Gift Acceptance Authority

Section: 2 U.S.C. §437c

Recommendation: The Commission recommends that Congress give the Commission authority to accept funds and services from private sources to enable the Commission to provide guidance and conduct research on election administration and campaign finance issues.

Explanation: The Commission has been very restricted in the sources of private funds it may accept to finance topical research, studies, and joint projects with other entities because it does not have statutory gift acceptance authority. In view of the Commission's expanding role in this area, Congress should consider amending the Act to provide the Commission with authority to accept gifts from private sources. Permitting the Commission to obtain funding from a broader range of private organizations would allow the Commission to have more control in structuring and conducting these activities and avoid the expenditure of government funds for these activities. If this proposal were adopted, however, the Commission would not accept funds from organizations that are regulated by or have financial relations with the Commission.

Miscellaneous

Draft Committees

Section: 2 U.S.C. §§431(8)(A)(i) and (9)(A)(i), 441a(a)(1) and 441b(b)

Recommendation: The Commission recommends that Congress consider the following amendments to the Act in order to prevent a proliferation of "draft" committees and to reaffirm Congressional intent that draft committees are "political committees" subject to the Act's provisions.

1. *Bring Funds Raised and Spent for Undeclared but Clearly Identified Candidates Within the Act's Purview.* Section 431(8)(A)(i) should be amended to include in the definition of "contribution" funds contributed by persons "for the purpose of influencing a clearly identified *individual* to seek nomination for election or election to Federal office...." Section 431(9)(A)(i) should be similarly amended to include within the definition of "expenditure" funds expended by persons on behalf of such "a clearly identified *individual*."

2. *Restrict Corporate and Labor Organization Support for Undeclared but Clearly Identified Candidates.* Section 441b(b) should be revised to expressly state that corporations, labor organizations and national banks are prohibited from making contributions or expenditures "for the purpose of influencing a clearly identified *individual* to seek nomination for election or election..." to federal office.

3. *Limit Contributions to Draft Committees.* The law should include explicit language stating that no person shall make contributions to *any* committee (including a draft committee) established to influence the nomination or election of a clearly identified *individual* for any federal office which, in the aggregate, exceed that person's contribution limit, per candidate, per election.

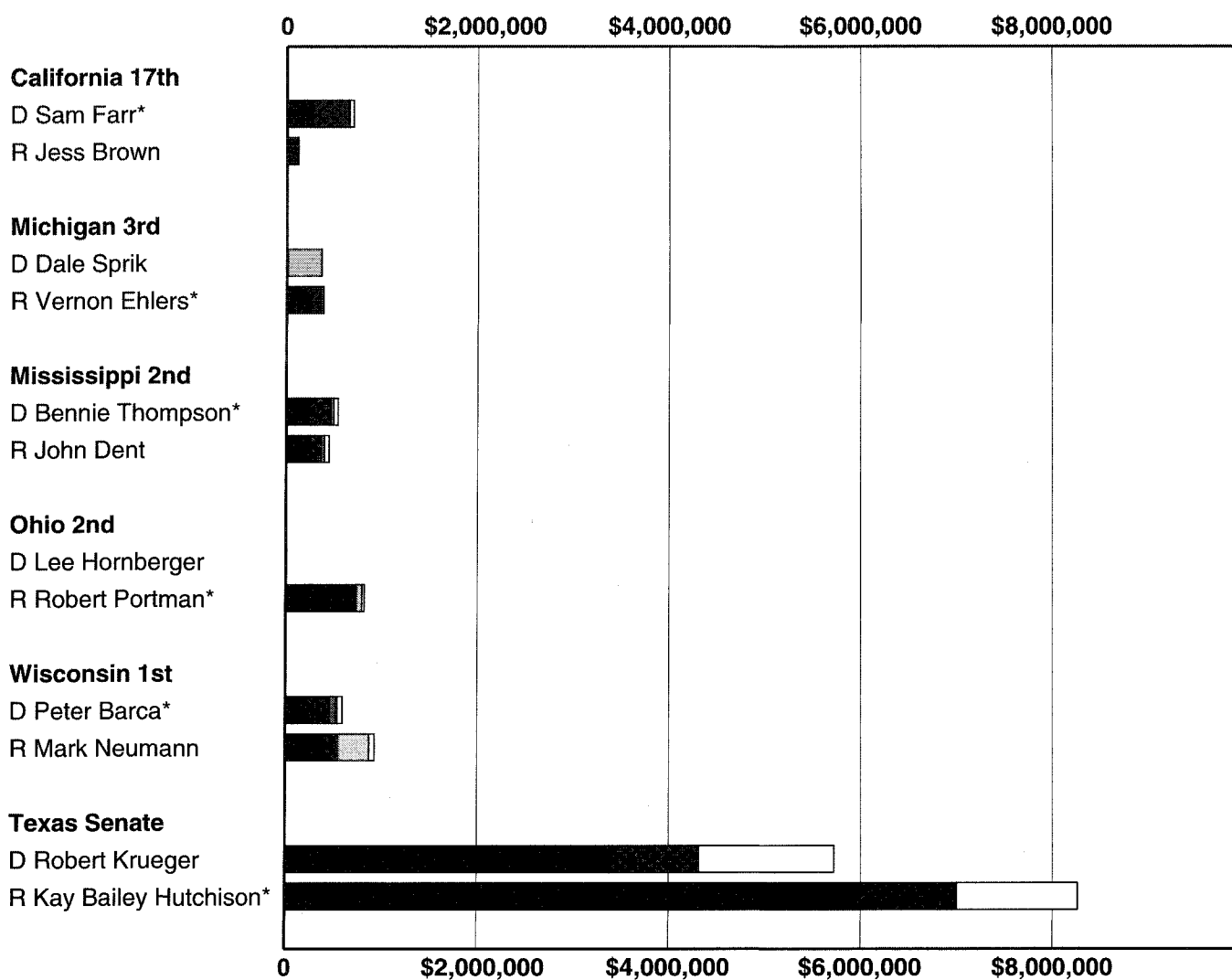
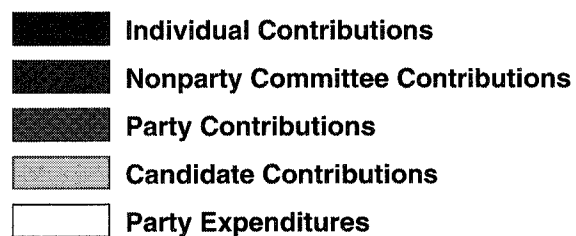
Explanation: These proposed amendments were prompted by the decisions of the U.S. Court of Appeals for the District of Columbia Circuit in *FEC v. Machinists Non-Partisan Political League* and *FEC v.*

Citizens for Democratic Alternatives in 1980 and of the U.S. Court of Appeals for the Eleventh Circuit in *FEC v. Florida for Kennedy Committee*. The District of Columbia Circuit held that the Act, as amended in 1979, regulated only the *reporting requirements* of draft committees. The Commission sought review of this decision by the Supreme Court, but the Court declined to hear the case. Similarly, the Eleventh Circuit found that "committees organized to 'draft' a person for federal office" are not "political committees" within the Commission's investigative authority. The Commission believes that the appeals court rulings create a serious imbalance in the election law and the political process because a nonauthorized group organized to support someone who has not yet become a candidate may operate completely outside the strictures of the Federal Election Campaign Act. However, any group organized to support someone who has in fact become a candidate is subject to the Act's registration and reporting requirements and contribution limitations. Therefore, the potential exists for funneling large aggregations of money, both corporate and private, into the federal electoral process through unlimited contributions made to nonauthorized draft committees that support a person who has not yet become a candidate. These recommendations seek to avert that possibility.

The Act presently enables the Commission to seek injunctive relief after the administrative process has been completed and this is more than sufficient. (See 2 U.S.C. §437g(a)(6)(A).)

Chapter Six Campaign Finance Statistics

Contributions and Party Expenditures for 1993 Special Elections

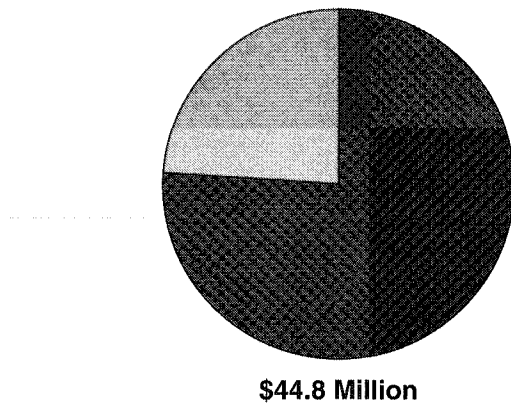


*Winner.

1993 Fundraising by Republican National Committee (RNC)

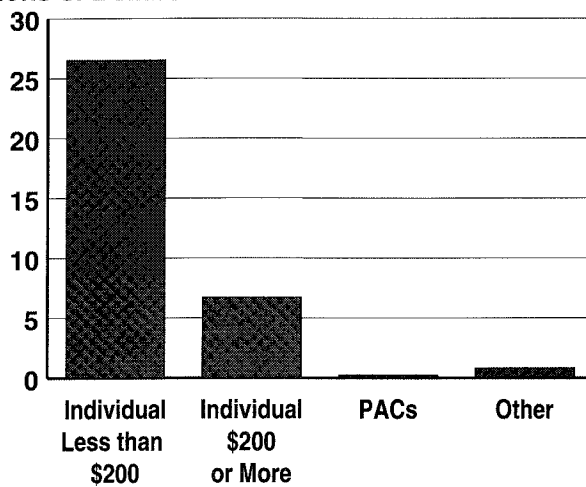
■ Hard Dollars*
■ Soft Dollars†

Total Receipts by Category



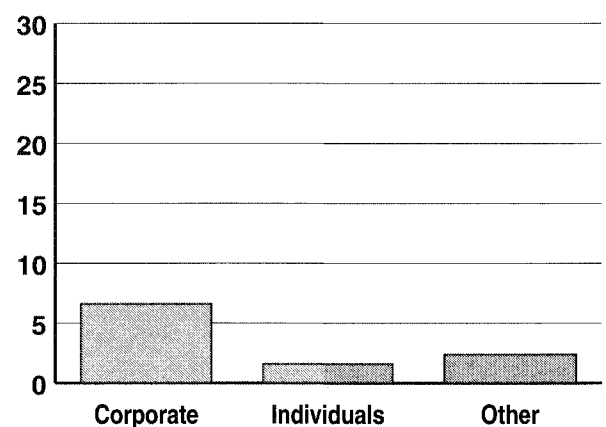
Hard Dollar Receipts by Source

Millions of Dollars



Soft Dollar Receipts by Source†

Millions of Dollars



* Money raised subject to the prohibitions and limitations of federal election law.

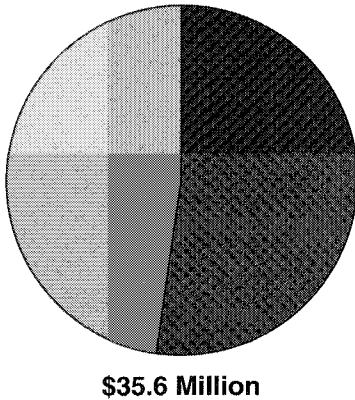
† Money raised outside the prohibitions and limitations of federal election law.

‡ In these charts, the categories of "Soft Dollar Receipts by Source" differ because the RNC and the DNC categorize their soft money receipts differently.

1993 Fundraising by Democratic National Committee (DNC)

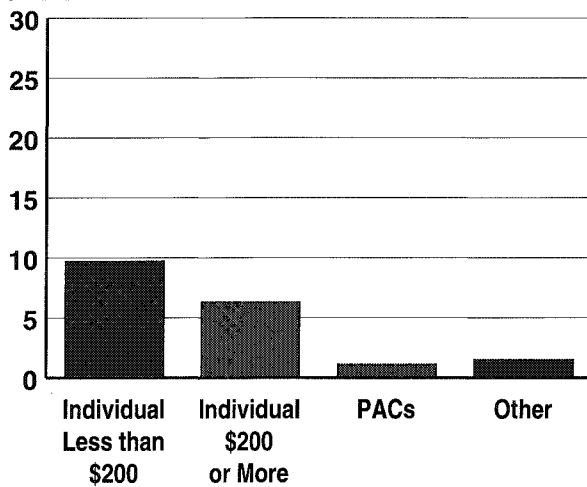
 Hard Dollars^{*}
 Soft Dollars[†]

Total Receipts by Category



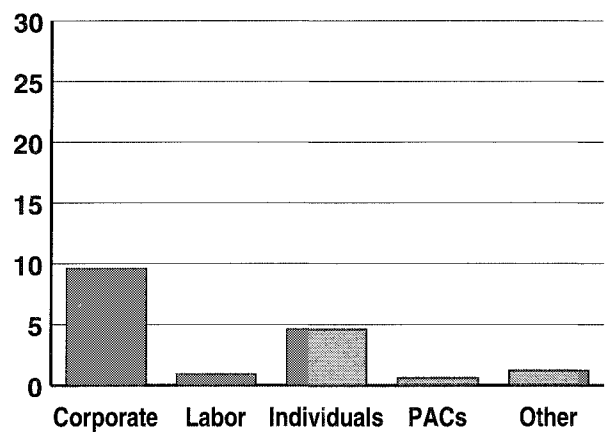
Hard Dollar Receipts by Source

Millions of Dollars



Soft Dollar Receipts by Source[‡]

Millions of Dollars

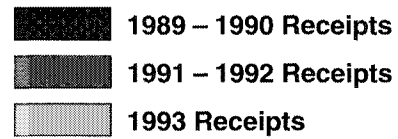


^{*} Money raised subject to the prohibitions and limitations of federal election law.

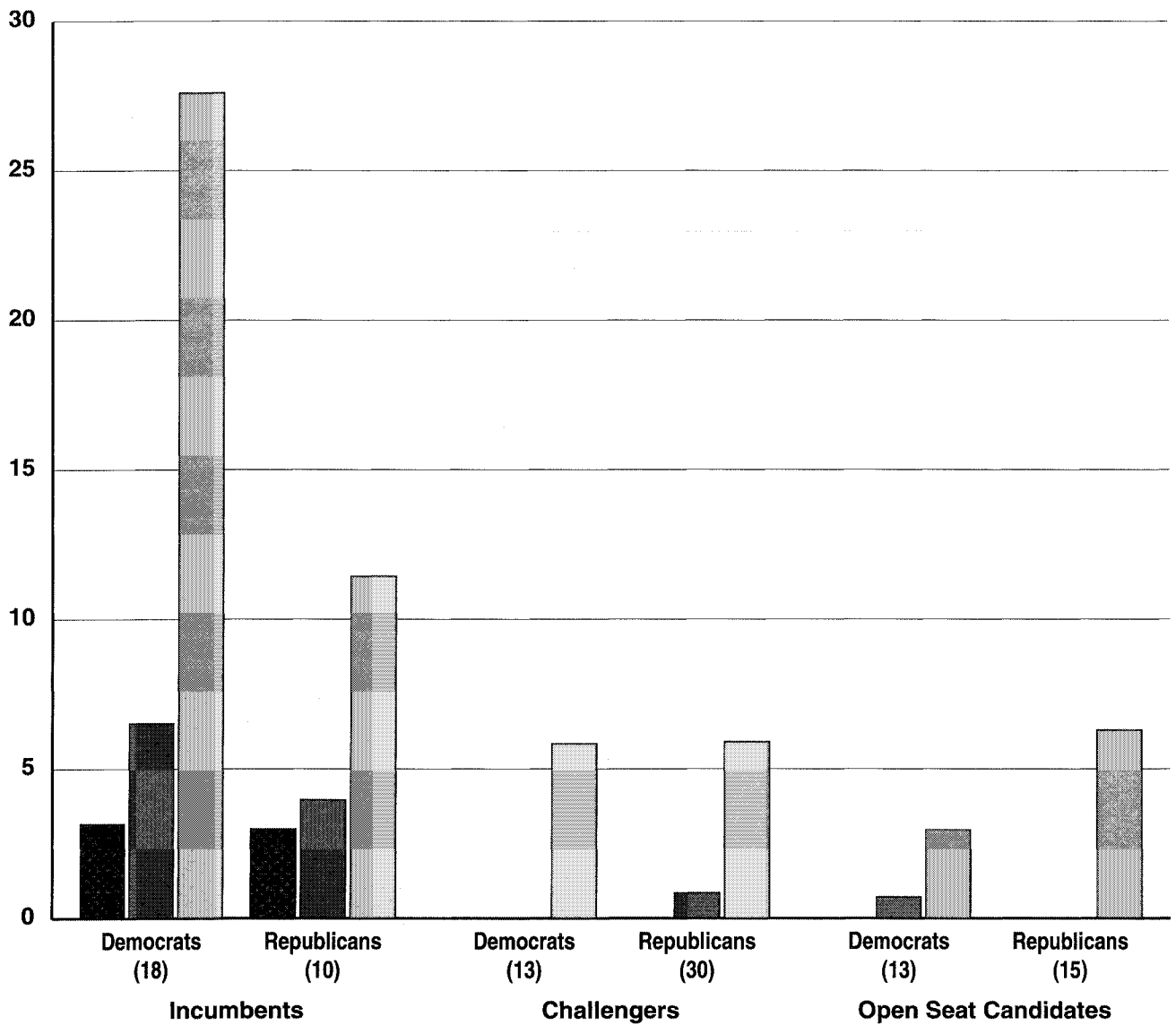
[†] Money raised outside the prohibitions and limitations of federal election law.

[‡] In these charts, the categories of "Soft Dollar Receipts by Source" differ because the RNC and the DNC categorize their soft money receipts differently.

Receipts of 1994 Senate Candidates



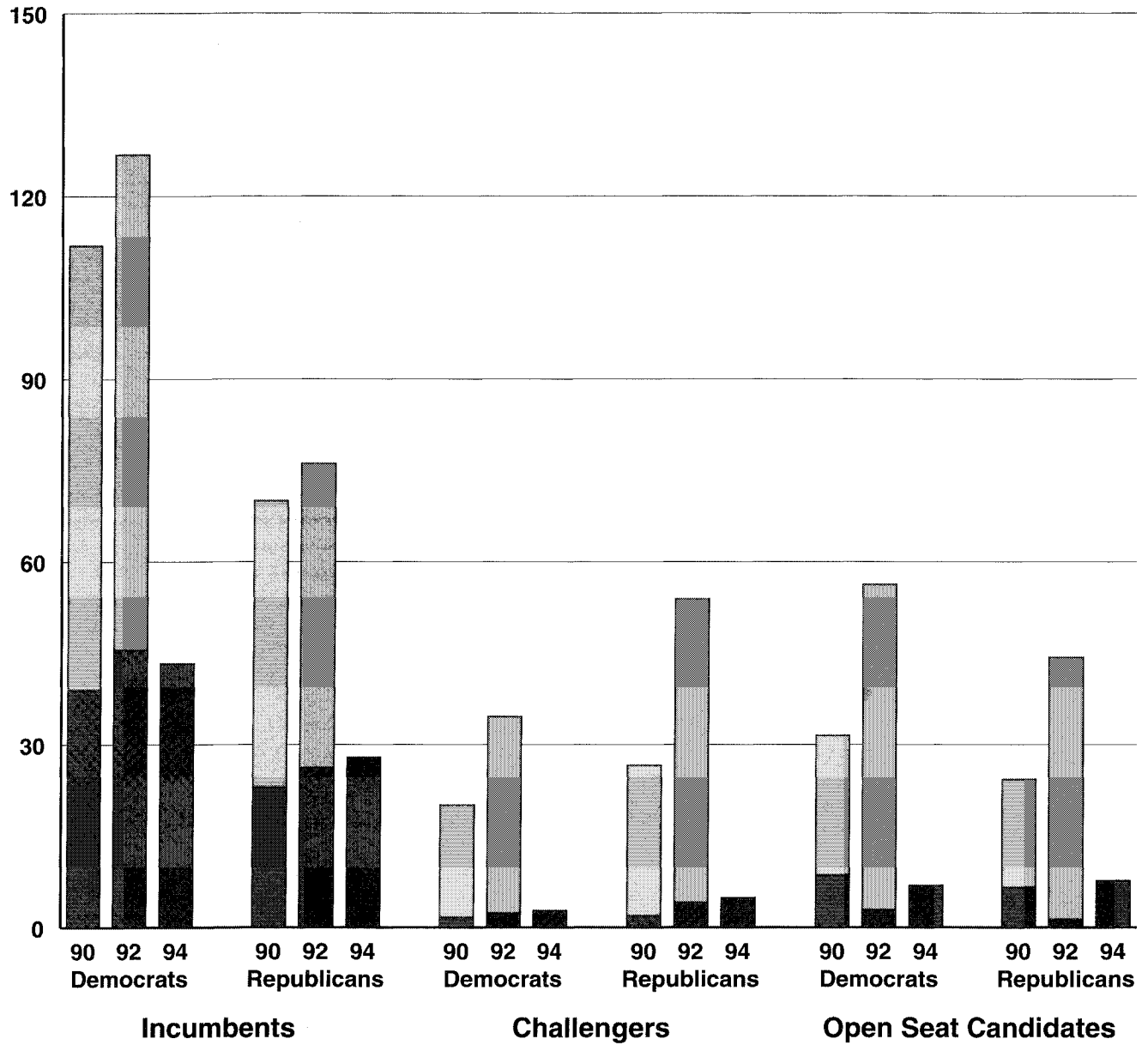
Millions of Dollars



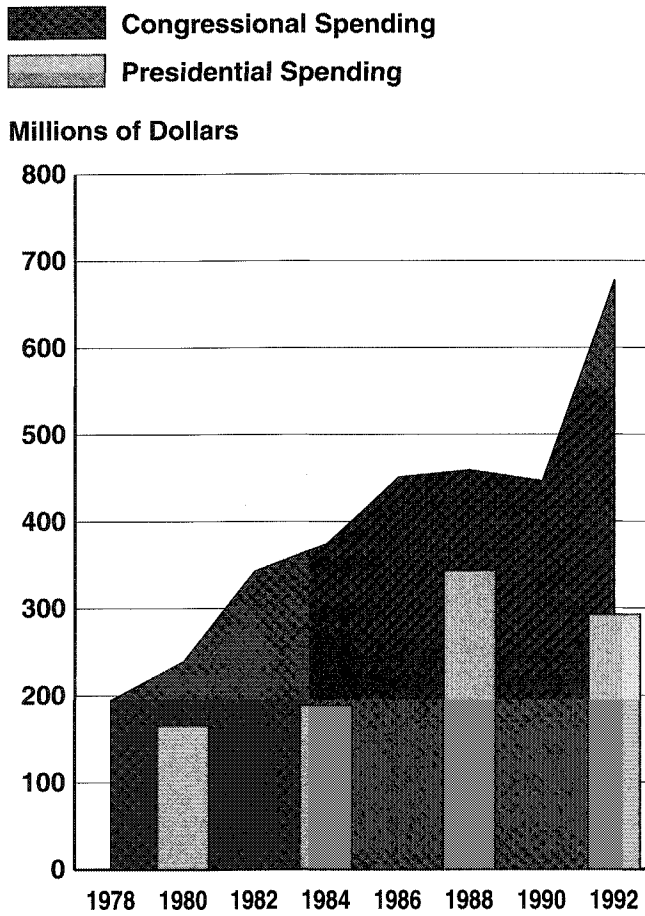
Receipts of House Candidates for Each Year of Election Cycle 1990 – 1994 Cycles

Election Year
 Nonelection Year

Millions of Dollars

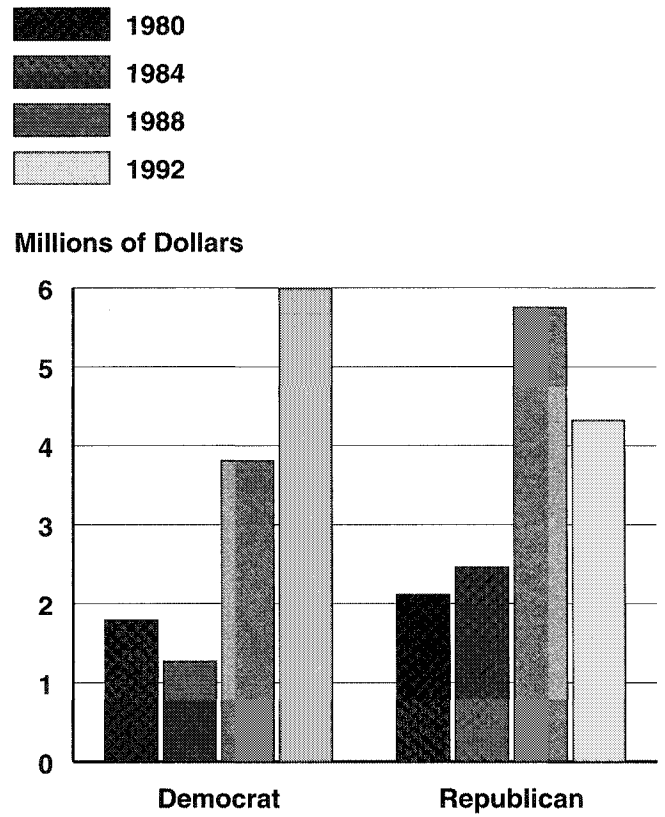


Comparison of Presidential and Congressional Spending





Source: *The Presidential Public Funding Program*, a 1993 FEC publication.

Presidential General Election Compliance Account Receipts

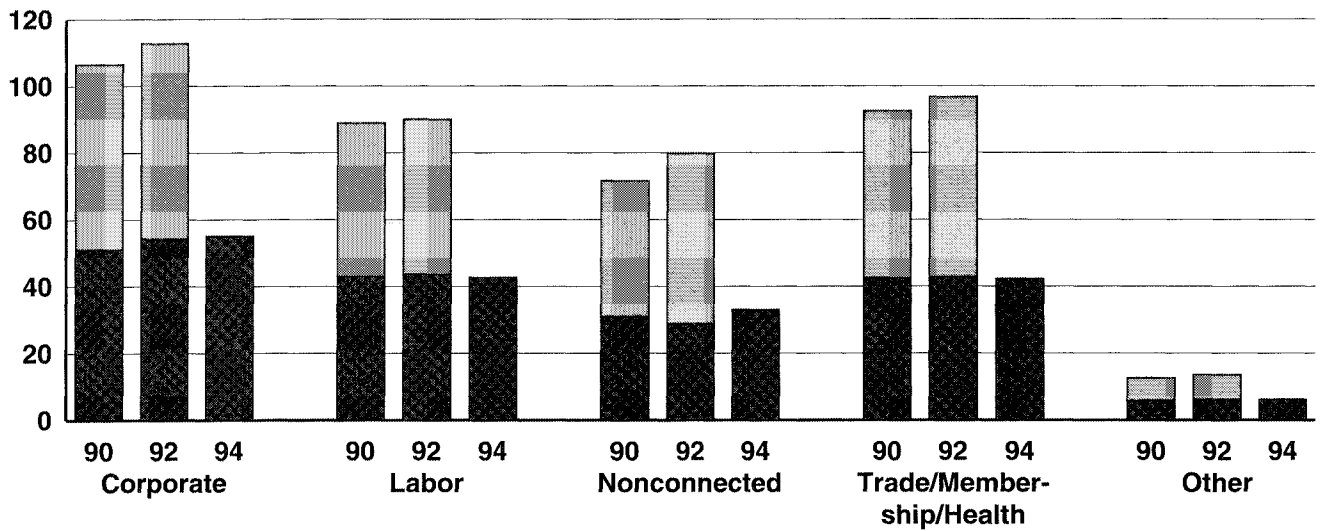


Source: *The Presidential Public Funding Program*, a 1993 FEC publication.

**PAC Receipts for Each Year
of Election Cycle
1990 – 1994 Cycles**

 Election Year
 Nonelection Year

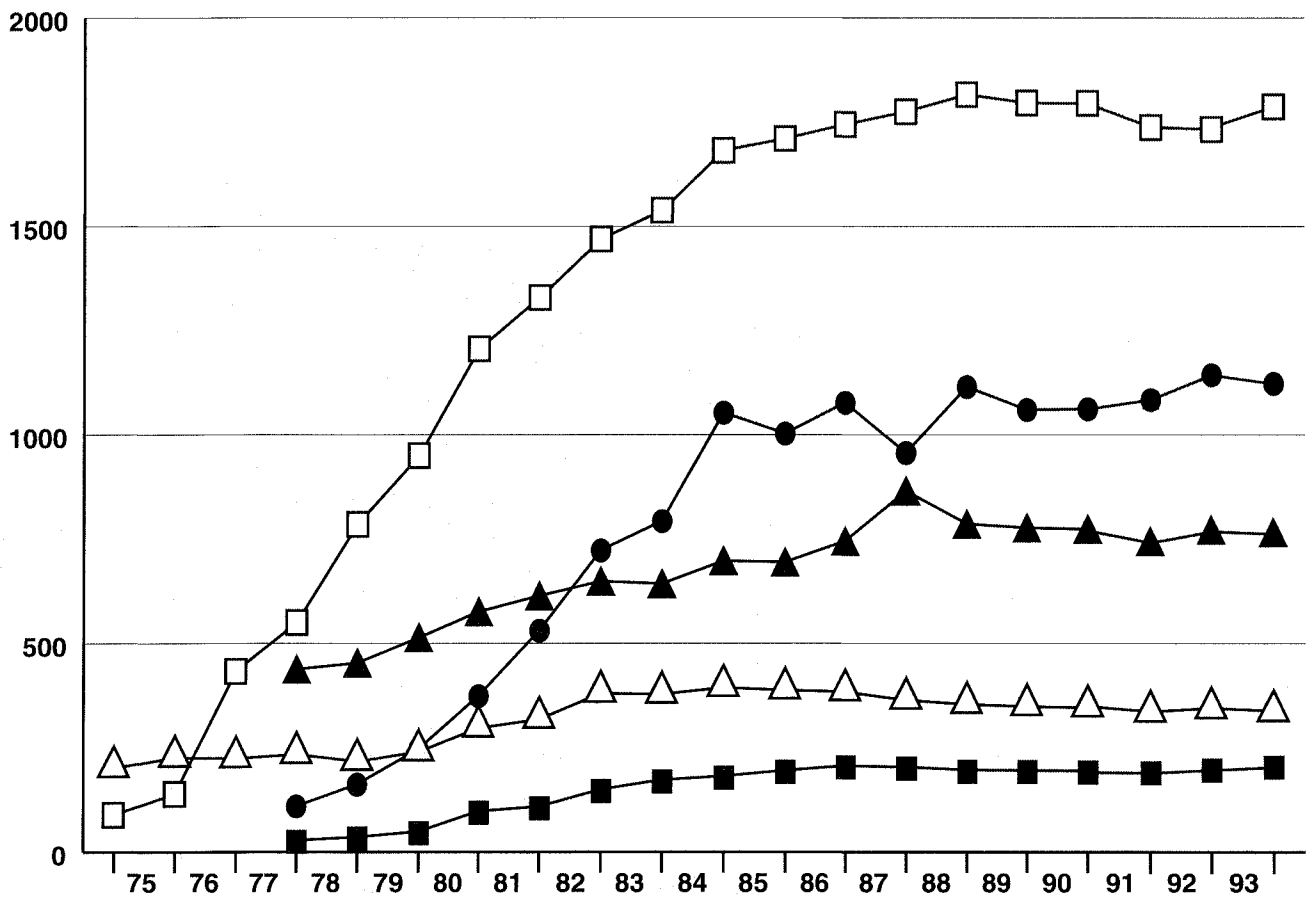
Millions of Dollars



Number of PACs, 1975–93*

- Corporate
- Nonconnected
- ▲ Trade/Membership/Health
- △ Labor
- Other[†]

Number
of PACs



* For the years 1974 through 1976, numbers are not available for Nonconnected PACs, Trade/Membership/Health PACs or PACs in the "Other" category.

[†] "Other" category includes PACs formed by corporations without capital stock and PACs formed by incorporated cooperatives.

Appendix 1

Biographies of Commissioners and Officers

Commissioners

Scott E. Thomas, Chairman

April 30, 1997¹

Mr. Thomas was appointed to the Commission in 1986 and reappointed in 1991. He was elected Vice Chairman for 1992 and Chairman for 1993, having earlier been Chairman in 1987. He previously served as executive assistant to former Commissioner Thomas E. Harris and succeeded him as Commissioner. Joining the FEC as a legal intern in 1975, Mr. Thomas eventually became an Assistant General Counsel for Enforcement.

A Wyoming native, Chairman Thomas graduated from Stanford University and holds a J.D. degree from Georgetown University Law Center. He is a member of the District of Columbia bar.

Trevor Potter, Vice Chairman

April 30, 1997

Mr. Potter was confirmed by the Senate as a Commissioner in November of 1991. He served as Vice Chairman of the Commission's Finance Committee and Chairman of its Regulations Task Force during 1992. He was elected Commission Vice Chairman for 1993 and Chairman for 1994.

Before his appointment, Mr. Potter specialized in campaign and election law as a partner in a Washington, D.C. law firm. His previous experience in government includes serving as Assistant General Counsel at the Federal Communications Commission from 1984 to 1985, and as a Department of Justice attorney from 1982 to 1984.

Mr. Potter is a graduate of Harvard College. He earned his J.D. degree at the University of Virginia School of Law, where he served as Editor-in-Chief of the Virginia Journal of International Law and was a member of the Order of the Coif. He is currently Chairman of the American Bar Association Committee on Election Law, Administrative Law Section. Mr. Potter is a resident of Fauquier County, Virginia.

Joan D. Aikens

April 30, 1995

One of the original members of the Commission, Commissioner Aikens was first appointed in 1975. Following the reconstitution of the FEC that resulted from the Supreme Court's *Buckley v. Valeo* decision, President Ford reappointed her to a five-year term. In 1981, President Reagan named Commissioner Aikens to complete a term left open because of a resignation and, in 1983, once again reappointed her to a full six-year term. Most recently, Commissioner Aikens was reappointed by President Bush in 1989. She served as FEC Chairman in 1978, 1986 and 1992.

Before her 1975 appointment, Commissioner Aikens was an executive with Lew Hodges Communications, a public relations firm in Valley Forge, Pennsylvania. She was also a member of the Pennsylvania Republican State Committee, president of the Pennsylvania Council of Republican Women and on the board of directors of the National Federation of Republican Women. A native of Delaware County, Pennsylvania, Commissioner Aikens has been active in a variety of volunteer organizations and was a member of the Commonwealth Board of the Medical College of Pennsylvania and a past President of Executive Women in Government. She is currently a member of the board of directors of Ursinus College, where she received her B.A. degree and an honorary Doctor of Law degree.

Lee Ann Elliott

April 30, 1993

Commissioner Elliott was first appointed in 1981 and reappointed in 1987 by President Reagan. She served as chairman in 1984 and 1990. Before her first appointment, Commissioner Elliott was vice president of a political consulting firm, Bishop, Bryant & Associates, Inc. From 1961 to 1979, she was an executive of the American Medical Political Action Committee. Commissioner Elliott was on the board of directors of the American Association of Political Consultants and on the board of the Chicago Area Public Affairs Group, of which she is a past president. She was also a member of the Public Affairs Committee of the U.S.

¹ Term expiration date.

Chamber of Commerce. In 1979, she received the Award for Excellence in Serving Corporate Public Affairs from the National Association of Manufacturers.

A native of St. Louis, Commissioner Elliott graduated from the University of Illinois. She also completed Northwestern University's Medical Association Management Executive Program and is a Certified Association Executive.

Danny L. McDonald

April 30, 1993

Now serving his second term as Commissioner, Mr. McDonald was first appointed to the Commission in 1981 and was reappointed in 1987. Before his original appointment, he managed 10 regulatory divisions as the general administrator of the Oklahoma Corporation Commission. He had previously served as secretary of the Tulsa County Election Board and as chief clerk of the board. He was also a member of the Advisory Panel to the FEC's National Clearinghouse on Election Administration.

A native of Sand Springs, Oklahoma, Mr. McDonald graduated from Oklahoma State University and attended the John F. Kennedy School of Government at Harvard University. He served as FEC Chairman in 1983 and 1989.

John Warren McGarry

April 30, 1995

First appointed to the Commission in 1978, Commissioner McGarry was reappointed in 1983 and 1989. He served as FEC Chairman in 1991, 1985 and 1981. Before his 1978 Commission appointment, Commissioner McGarry served as special counsel on elections to the House Administration Committee. He previously combined private law practice with service as chief counsel to the House Special Committee to Investigate Campaign Expenditures, a special committee established by Congress every election year through 1972. Before his work with Congress, Commissioner McGarry was the Massachusetts assistant attorney general.

After graduating cum laude from Holy Cross College, Commissioner McGarry did graduate work at Boston University and earned a J.D. degree from Georgetown University Law School.

Statutory Officers

John C. Surina, Staff Director

Before joining the Commission in 1983, Mr. Surina was assistant managing director of the Interstate Commerce Commission, where he was detailed to the "Reform 88" program at the Office of Management and Budget. In that role, he worked on projects to reform administrative management within the federal government. He was also an expert-consultant to the Office of Control and Operations, EOP-Cost of Living Council-Pay Board and on the technical staff of the Computer Sciences Corporation. During his Army service, Mr. Surina was executive officer of the Special Security Office, where he supported senior U.S. delegates to NATO's civil headquarters in Brussels. Mr. Surina served as 1991 chairman of the Council on Government and Ethics Laws (COGEL).

A native of Alexandria, Virginia, Mr. Surina holds a degree in Foreign Service from Georgetown University. He also attended East Carolina University and American University.

Lawrence M. Noble, General Counsel

Mr. Noble became General Counsel in 1987, after serving as Acting General Counsel. He joined the Commission in 1977, becoming the Deputy General Counsel in 1983. He previously served as Assistant General Counsel for Litigation and as a litigation attorney. Before his FEC service, he was an attorney with the Aviation Consumers Action Project.

A native of New York, Mr. Noble holds a degree in Political Science from Syracuse University and a J.D. degree from the National Law Center at George Washington University. He is a member of the bars for the U.S. Supreme Court, the U.S. Court of Appeals for the D.C. Circuit and the District of Columbia. He is also a member of the American and District of Columbia Bar Associations.

Lynne McFarland, Inspector General

Ms. McFarland became the FEC's first permanent Inspector General in February 1990. She came to the Commission in 1976, first as a reports analyst and then as a program analyst in the Office of Planning and Management.

A Maryland native, Ms. McFarland holds a sociology degree from Frostburg State College and is a member of the Institute of Internal Auditors.

Appendix 2

Chronology of Events

January

- 1 — Chairman Scott E. Thomas and Vice Chairman Trevor Potter begin their one-year terms of office.
 - Public Records Office begins offering Tuesday afternoon faxing service.
 - Updated *FEC MUR Index* is published.
- 14 — FEC press release lists official 1992 Presidential vote counts.
- 26 — FEC sends President and Congress 63 legislative recommendations.
- 31 — 1992 year-end report due.

February

- 1 — Commission publishes "Local Party Activity" brochure.
- 24 — Chairman Thomas, Vice Chairman Potter and Commissioner McDonald testify before House Appropriations' Subcommittee on Treasury, Postal Service and General Government.
- 25 — FEC determines final repayments by 1988 Dukakis primary campaign.

March

- 1 — FEC announces 1993 coordinated party expenditure limit for House Special Elections.
- 4 — FEC press release reports on House and Senate spending in 1992 election cycle.
 - FEC determines final repayments by 1988 Simon primary campaign.
- 11 — FEC issues press release on national party fundraising.
- 16 — Chairman Thomas, Vice Chairman Potter and Commissioner McDonald testify before the House Administration's Subcommittee on Elections.
- 17 — FEC announces \$64,000 in civil penalties for 10 individuals who violated annual contribution limits.
- 19 — Dukakis challenges FEC repayment determination in court.
- 24-26 — FEC's National Clearinghouse on Election Administration holds Advisory Panel meeting in Savannah, GA.

- 31 — FEC holds public hearing on "best efforts" regulations.

April

- 1 — FEC issues retrospective report on Presidential public funding.
 - FEC publishes revised *Campaign Guide for Congressional Candidates and Committees*.
 - FEC releases 1993 coordinated party expenditure limit for Texas Special Senate Election.
 - FEC holds public hearing on rules on ex parte communications.
- 2 — Simon challenges FEC repayment determination in court.
- 7 — FEC sets July 1 as effective date for ban on transfers from nonfederal campaigns to federal committees.
- 13 — Mississippi holds special runoff election (special general March 30).
- 15 — FEC determines final repayment by 1988 Jackson primary campaign.
- 22 — Vice Chairman Potter testifies on FEC budget before Senate Committee on Rules and Administration.
- 29 — FEC press release provides comprehensive data on PAC activity.

May

- 4 — Ohio holds special election in 2nd Congressional District (primary March 16).
 - Wisconsin holds special election in 1st Congressional District (primary April 6).
- 20 — President Clinton signs the National Voter Registration Act of 1993 (NVRA, sometimes called the "motor voter" law).
- 21 — FEC Chairman Thomas assures state governors that the Commission will work with them to implement the NVRA.

June

- 1 — *Annual Report 1992* is published.
 - FEC publishes *Federal Elections 92*, 1992 federal election results.
- 5 — Texas holds special runoff election for Senate seat (special general May 1).

- 8 — California holds special runoff election in 17th congressional District (special general April 13).
- 11-12 — FEC staff provide technical assistance to committees in Hartford, CT.
- 24-25 — FEC staff provide technical assistance to committees in Indianapolis, IN.

July

- 1 — FEC's National Clearinghouse on Election Administration publishes Election Case Law 93.
 - Effective date of ban on transfers from non-federal campaigns to federal campaigns.
- 2 — U.S. Court of Appeals for D.C. Circuit directs FEC to certify matching funds for the 1992 LaRouche primary campaign.
- 8 — FEC publishes Notice of Proposed Rulemaking on enforcement regulations.
- 8-9 — FEC staff provide technical assistance to committees in Lincoln, NE.
- 15-16 — FEC staff provide technical assistance to committees in Helena, MT.
- 31 — 1993 midyear report due.

August

- 1 — Commission publishes "Selected Court Case Abstracts, 1977—1993."
- 6 — FEC sends Congress new rules on multicandidate committees.
- 10 — President Clinton signs the Omnibus Budget Reconciliation Act, which included a \$3 tax checkoff for the Presidential Election Campaign Fund.
- 12 — FEC publishes Notice of Proposed Rulemaking on Presidential conventions
- 17 — FEC issues Press Release on Senate activity.
- 19-20 — FEC staff provide technical assistance to committees in Harrisburg, PA.
- 30 — FEC sends Congress final rule on definition of member.
 - FEC publishes Notice of Proposed Rulemaking on candidates' personal use of campaign funds.

September

- 30 — FEC two-day regional conference begins in San Francisco, CA.

October

- 1 — FEC submits budget request to OMB and Congress.
 - FEC publishes revised brochure on Direct Access Program.
- 20 — Commission holds public hearing on proposed changes to enforcement regulations.
 - Robertson challenges FEC's repayment determination in court.
- 21 — Commission adopts, on a trial basis, procedures to permit outside comment on draft advisory opinions.
- 22 — U.S. Court of Appeals for the District of Columbia, in *FEC v. NRA*, rules that the composition of the FEC "violates the Constitution's separation of powers."
- 26 — Commission votes to reconstitute itself as a six-member body, comprising only those Commissioners appointed by the President.
- 27 — FEC sends Congress new rules on "Best Efforts."
 - Commission holds public hearing on rules governing publicly funded Presidential nominating conventions.

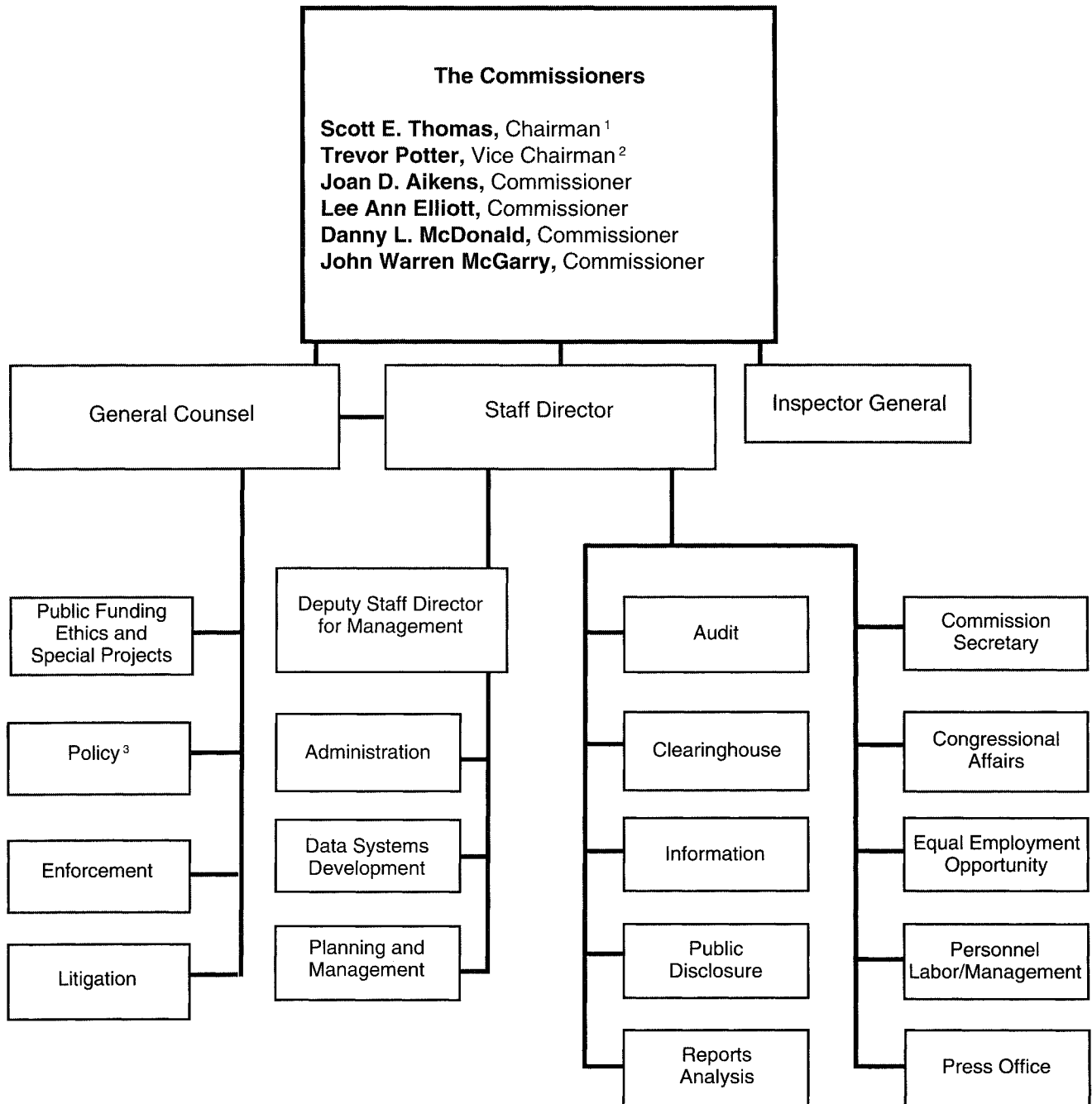
November

- 2 — Commission votes to petition the Supreme Court for a writ of certiorari in *FEC v. NRA*.
- 4 — Commission votes to ratify existing regulations and forms, and to confirm the efficacy of its advisory opinions.
- 9 — Commission ratifies its past actions on ongoing audits and adopts procedures for ratifying ongoing enforcement cases and litigation.
- 10 — Effective date of new rules on Membership Associations.
 - FEC releases audit of 1992 Democratic Convention host committee.
 - FEC adopts revised interim rules on ex parte communications.

December

- 1 — Commission publishes "The \$3 Tax Check-off" brochure.
- 7 — Michigan holds special election in 3rd Congressional District (primary November 2).
- 9 — Commission votes to take no further action on 137 enforcement cases and 9 internal enforcement referrals, as part of prioritization process.
- 9 — Commission votes to create a task force to evaluate allocation rules.
- 13 — In a news conference, Chairman Scott E. Thomas, Vice Chairman Trevor Potter and General Counsel Lawrence Noble discuss enforcement prioritization program.
- 13 — FEC two-day PAC conference begins in Washington, DC.
- 15 — Commission elects Trevor Potter as 1994 Chairman and Danny L. McDonald as 1994 Vice Chairman.

Appendix 3 FEC Organization Chart



¹ Trevor Potter was elected 1994 Chairman.

² Danny L. McDonald was elected 1994 Vice Chairman.

³ Policy covers regulations, advisory opinions, legal review and administrative law.

Appendix 4 FEC Offices

This appendix briefly describes the offices within the Commission, located at 999 E Street, NW, Washington, D.C. 20463. The offices are listed alphabetically, with local telephone numbers given for offices that provide services to the public. **Commission offices can also be reached toll-free on 800-424-9530 and locally on 202-219-3440.**

Administration

The Administration Division is the Commission's "housekeeping" unit and is responsible for accounting, procurement and contracting, space management, payroll, travel and supplies. In addition, several support functions are centralized in the office such as printing, document reproduction and mail services. The division also handles records management, telecommunications, inventory control and building security and maintenance.

Audit

Many of the Audit Division's responsibilities concern the Presidential public funding program. The division evaluates the matching fund submissions of Presidential primary candidates and determines the amount of contributions that may be matched with federal funds. As required by law, the division audits all public funding recipients.

In addition, the division audits those committees which, according to FEC determinations, have not met the threshold requirements for substantial compliance with the law. Audit Division resources are also used in the Commission's investigations of complaints.

Clearinghouse

The National Clearinghouse on Election Administration, located on the seventh floor, assists state and local election officials by responding to inquiries, publishing research and conducting workshops on all matters related to election administration. Additionally, the Clearinghouse answers questions from the public and briefs foreign delegations on the U.S. election process. Local phone: 202-219-3670.

Commission Secretary

The Secretary to the Commission handles all administrative matters relating to Commission meetings, including agenda documents, Sunshine Act notices, minutes and certification of Commission votes. The office also circulates and tracks numerous materials not related to meetings, and records the Commissioners' tally votes on these matters.

Commissioners

The six Commissioners—three Democrats and three Republicans—are appointed by the President and confirmed by the Senate.

The six Commissioners serve full time and are responsible for administering and enforcing the Federal Election Campaign Act. They generally meet twice a week, once in closed session to discuss matters that, by law, must remain confidential, and once in a meeting open to the public. At these meetings, they formulate policy and vote on significant legal and administrative matters.

Congressional, Legislative and Intergovernmental Affairs

This office serves as primary liaison with Congress and Executive Branch agencies. The office is responsible for keeping Members of Congress informed about Commission decisions and, in turn, for keeping the agency up to date on legislative developments. Local phone: 202-219-4136.

Data Systems Development

This division provides computer support for the entire Commission. Its responsibilities are divided into two general areas.

In the area of campaign finance disclosure, the Data Systems Development Division enters into the FEC data base information from all reports filed by political committees and other entities. The division is also responsible for the computer programs that sort and organize campaign finance data into indexes.

These indexes permit a detailed analysis of campaign finance activity and, additionally, provide a tool for monitoring contribution limitations. The division publishes the *Reports on Financial Activity* series of periodic studies on campaign finance and generates statistics for other publications.

The division also provides internal computer support for the agency's automation system (VAX) and for administrative functions such as management information, document tracking, personnel and payroll systems.

Equal Employment Opportunity Programs (EEOP)

The EEOP office advises the Commission on the prevention of discriminatory practices. The EEO Officer manages the Commission's Equal Employment Opportunity Program and develops plans to improve the Commission's equal employment opportunities.

The office is also responsible for administering the discrimination complaint system; overseeing the Special Emphasis Program; training Commission staff on the EEO Program; and reporting on the status of Commission's EEO program.

General Counsel

The General Counsel directs the agency's enforcement activities and represents and advises the Commission in any legal actions brought against it and serves as the Designated Agency Ethics Official. The Office of General Counsel handles all civil litigation, including several cases that have come before the Supreme Court. The office also drafts, for Commission consideration, advisory opinions and regulations as well as other legal memoranda interpreting the federal campaign finance law.

Information

In an effort to promote voluntary compliance with the law, the Information Division provides technical assistance to candidates, committees and others involved

in elections. Responding to phone and written inquiries, members of the staff conduct research based on the statute, FEC regulations, advisory opinions and court cases. Staff also direct workshops on the law and produce guides, pamphlets and videos on how to comply with the law. Located on the second floor, the division is open to the public. Local phone: 202-219-3420; toll-free phone: 800-424-9530.

Inspector General

The FEC's Inspector General (IG) has two major responsibilities: to conduct internal audits and investigations to detect fraud, waste and abuse within the agency and to improve the economy and effectiveness of agency operations. The IG files reports notifying Congress of any serious problems or deficiencies in agency operations and of any corrective steps taken by the agency.

Law Library

The Commission law library, part of the Office of General Counsel, is located on the eighth floor and is open to the public. The collection includes basic legal research tools and materials dealing with political campaign finance, corporate and labor political activity and campaign finance reform. The library staff prepares indices to advisory opinions and Matters Under Review (MURs) as well as a *Campaign Finance and Federal Election Law Bibliography*, all available for purchase at the Public Records Office. Local phone: 202-219-3312.

Personnel and Labor/Management Relations

This office handles employment, position classification, training and employee benefits. It also provides policy guidance on awards and discipline matters and administers a comprehensive labor relations program including contract negotiations and resolution of disputes before third parties.

Planning and Management

This office develops the Commission's budget and, each fiscal year, prepares a management plan determining the allocation and use of resources throughout the agency. Planning and Management monitors adherence to the plan, providing monthly reports measuring the progress of each division in achieving the plan's objectives.

Press Office

Staff of the Press Office are the Commission's official media spokespersons. In addition to publicizing Commission actions and releasing statistics on campaign finance, they respond to all questions from representatives of the print and broadcast media. Located on the first floor, the office also handles requests under the Freedom of Information Act. Local phone: 202-219-4155.

Public Records

Staff from the Public Records Office provide information on the campaign finance activities of political committees and candidates involved in federal elections. Located on the first floor, the office is a library facility with ample work space and a knowledgeable staff to help researchers locate documents and computer data. The FEC encourages the public to review the many resources available, including committee reports, computer indexes, advisory opinions and closed MURs. Local phone: 202-219-4140.

Reports Analysis

Reports analysts assist committee officials in complying with reporting requirements and conduct detailed examinations of the campaign finance reports filed by political committees. If an error, omission or prohibited activity (e.g., an excessive contribution) is discovered in the course of reviewing a report, the analyst sends the committee a letter which requests that the committee either amend its reports or provide further information concerning a particular problem. By sending these letters (RFAs), the Commission seeks to ensure full disclosure and to encourage the committee's voluntary compliance with the law. Analysts also provide frequent telephone assistance to committee officials and encourage them to call the division with reporting questions or compliance problems. Local phone: 202-219-3580.

Staff Director and Deputy Staff Director

The Staff Director carries the responsibilities of appointing staff, with the approval of the Commission, and implementing Commission policy. The Staff Director oversees the Commission's public disclosure activities, outreach efforts, review of reports and the audit program, as well as the administration of the agency.

The Deputy Staff Director has broad responsibility for assisting in this supervision, particularly in the areas of budget, administration and computer systems.

Appendix 5 Statistics on Commission Operations

Summary of Disclosure Files

| | Total Filers Existing in 1993 | Filers Terminated as of 12/31/93 | Continuing Filers as of 12/31/93 | Number of Reports and Statements in 1993 | Gross Receipts in 1993 | Gross Expenditures in 1993 |
|--|-------------------------------------|---|--|---|---------------------------|----------------------------------|
| Presential Candidate Committees | 447 | 21 | 426 | 386 | \$10,467,382 | \$15,524,460 |
| Senate Candidate Committees | 768 | 26 | 742 | 1,221 | \$102,761,249 | \$68,599,073 |
| House Candidate Committees | 3,524 | 592 | 2,932 | 5,232 | \$109,062,430 | \$83,580,487 |
| Party Committees | 571 | 103 | 468 | 1,502 | \$248,094,102 | \$243,295,622 |
| Federal Party Committees | 535 | 103 | 432 | 1,247 | \$213,022,626 | \$207,245,994 |
| Reported Nonfederal Party Activity | 36 | 0 | 36 | 255 | \$35,071,476 | \$36,049,628 |
| Delegate Committees | 81 | 0 | 81 | 2 | \$3,583 | \$3,583 |
| Nonparty Committees | 4,356 | 146 | 4,210 | 17,175 | \$185,539,725 | \$144,767,190 |
| Labor Committees | 358 | 21 | 337 | 1,703 | \$44,338,470 | \$33,044,658 |
| Corporate Committees | 1,794 | 5 | 1,789 | 8,554 | \$56,773,797 | \$43,594,906 |
| Membership, Trade and Other Committees | 2,204 | 120 | 2,084 | 6,918 | \$84,427,458 | \$68,127,626 |
| Communication Cost Filers | 200 | 0 | 200 | 28 | N/A | \$72,086 |
| Independent Expenditures by Persons Other Than Political Committees | 289 | 3 | 286 | 59 | N/A | \$44,352 |

Divisional Statistics for Calendar Year 1993

| | Total |
|--|------------|
| Reports Analysis Division | |
| Documents processed | 52,718 |
| Reports reviewed | 46,222 |
| Telephone assistance and meetings | 8,808 |
| Requests for additional information (RFAs) | 7,944 |
| Second RFAs | 3,726 |
| Data coding and entry of RFAs and miscellaneous documents | 16,229 |
| Compliance matters referred to Office of General Counsel or Audit Division | 266 |
| Data Systems Development Division | |
| Documents receiving Pass I coding* | 36,502 |
| Documents receiving Pass III coding* | 40,567 |
| Documents receiving Pass I entry | 35,408 |
| Documents receiving Pass III entry | 40,789 |
| Transactions receiving Pass III entry | |
| •In-house | 54,450 |
| •Contract | 573,529 |
| Public Records Office | |
| Campaign finance material processed (total pages) | 1,193,644 |
| Requests for campaign finance reports | 10,271 |
| Visitors | 12,875 |
| Total people served | 23,146 |
| Information telephone calls | 17,780 |
| Computer printouts provided | 70,035 |
| Total income (transmitted to U.S. Treasury) | \$61,246 |
| Cumulative total pages of documents available for review | 11,467,462 |
| Contacts with state election offices | 3,269 |
| Notices of failure to file with state election offices | 413 |

| | Total |
|--|-----------|
| Administrative Division | |
| Contracting and procurement transactions | 2,801 |
| Pieces of outgoing mail processed | 86,649 |
| Publications prepared for print | 44 |
| Pages of photocopying | 9,208,493 |
| Information Services Division | |
| Telephone inquiries | 72,704 |
| Information letters | 55 |
| Distribution of FEC materials | 11,970 |
| Prior notices (sent to inform filers of reporting deadlines) | 25,287 |
| Other mailings | 45,999 |
| Visitors | 90 |
| Public appearances by Commissioners and staff | 141 |
| State workshops | 8 |
| Publications | 32 |
| Press Office | |
| Press releases | 159 |
| Telephone inquiries from press | 14,627 |
| Visitors to Press Office | 3,219 |
| Freedom of Information Act (FOIA) requests | 414 |
| Fees for materials requested under FOIA (transmitted to U.S. Treasury) | \$15,908 |
| Clearinghouse on Election Administration | |
| Telephone inquiries | 4,513 |
| Informational letters | 84 |
| Visitors | 64 |
| Publications | 3 |
| Foreign briefings | 35 |

* Computer coding and entry of campaign finance information occur in two phases. In the first phase, Pass I, summary information is coded and entered into the computer within 48 hours of the Commission's receipt of the report. During the second phase, Pass III, itemized information is coded and entered.

| | Total |
|---------------------------------------|-------|
| Office of General Counsel | |
| Advisory opinions | |
| Requests pending at beginning of 1993 | 4 |
| Requests received | 25 |
| Issued | 25 |
| Pending at end of 1993 | 4 |
| Compliance cases (MURs) | |
| Pending at beginning of 1993 | 329 |
| Opened | 119 |
| Closed | 231 |
| Pending at end of 1993 | 217 |
| Litigation | |
| Cases pending at beginning of 1993 | 40 |
| Cases opened | 12 |
| Cases closed | 12 |
| Cases pending at end of 1993 | 40 |
| Cases won | 9 |
| Cases lost | 1 |
| Cases voluntarily dismissed | 1 |
| Cases dismissed as moot | 1 |
| Law Library | |
| Telephone inquiries | 1,683 |
| Visitors served | 784 |

Audits Completed by Audit Division, 1975–1993

| | Total |
|--------------------------------|------------|
| Presidential | 77 |
| Presidential Joint Fundraising | 10 |
| Senate | 15 |
| House | 131 |
| Party (National) | 46 |
| Party (Other) | 115 |
| Nonparty (PACs) | 75 |
| Total | 469 |

Audit Reports Publicly Released

| Year | Title 2* | Title 26† | Total |
|---------------|------------|------------|------------|
| 1976 | 3 | 1 | 4 |
| 1977 | 6 | 6 | 12 |
| 1978 | 98‡ | 10 | 108 |
| 1979 | 75‡ | 9 | 84 |
| 1980 | 48‡ | 11 | 59 |
| 1981 | 27‡ | 13 | 40 |
| 1982 | 19 | 1 | 20 |
| 1983 | 22 | 0 | 22 |
| 1984 | 15 | 2 | 17 |
| 1985 | 4 | 9 | 13 |
| 1986 | 10 | 4 | 14 |
| 1987 | 12 | 4 | 16 |
| 1988 | 8 | 0 | 8 |
| 1989 | 2 | 7 | 9 |
| 1990 | 1 | 6 | 7 |
| 1991 | 5 | 8 | 13 |
| 1992 | 9 | 3 | 12 |
| 1993 | 10 | 2 | 12 |
| TOTALS | 374 | 126 | 470 |

* **Audits for cause:** The Commission may audit any federally registered political committee: 1) whose reports do not substantially comply with the law (under thresholds established by the Commission), or 2) if the Commission has found reason to believe that the committee has committed (or is about to commit) a violation of the law. 2 U.S.C. §§438(b) and 437g(2).

† **Title 26 audits:** The statute requires the Commission to give priority to these mandatory audits of publicly funded Presidential candidates and committees and convention committees.

‡ **Random audits:** The majority of these audits were performed under the Commission's random audit policy (pursuant to the former 2 U.S.C. §438(a)(8)), which provided for random audits of all categories of political committees (including party committees, PACs and candidate committees). Under that policy, for House and Senate candidates, the Commission randomly selected 10 percent of the states and Congressional districts and, in these jurisdictions, audited all the viable candidates in the general election. The authorization for random audits was repealed by Congress in 1979.

Status of Audits, 1993

| Audit Type | Pending at Beginning of Year | Opened | Closed | Pending at End of Year |
|--------------------------------|---|---------------|---------------|---------------------------------------|
| Presidential | 14 | 3 | 2 | 15 |
| Presidential Joint Fundraising | 0 | 1 | 0 | 1 |
| Senate | 1 | 4 | 0 | 5 |
| House | 5 | 4 | 4 | 5 |
| Party (National) | 0 | 0 | 0 | 0 |
| Party (Other) | 7 | 0 | 4 | 3 |
| Nonparty (PACs) | 2 | 0 | 2 | 0 |
| Total | 29 | 12 | 12 | 29 |

Appendix 6

1993 Federal Register Notices

1993-1

11 CFR Part 110: Transfers of Funds from State to Federal Campaigns; Final Rule and Retransmittal to Congress (58 FR 3474, January 8, 1993)

1993-2

11 CFR Part 104: Recordkeeping and Reporting by Political Committees; Best Efforts; Notice of Public Hearing (58 FR 4110, January 13, 1993)

1993-3

11 CFR Part 201: Ex Parte Communications; Notice of Public Hearing (58 FR 6875, February 3, 1993)

1993-4

Filing Dates for the Ohio Special Elections (58 FR 7230, February 5, 1993)

1993-5

Filing Dates for the Texas Special Election (58 FR 7785, February 9, 1993)

1993-6

Filing Dates for the Mississippi Special Election (58 FR 8052, February 11, 1993)

1993-7

Filing Dates for the California Special Election (58 FR 8959, February 18, 1993)

1993-8

11 CFR Parts 102 and 110: Multicandidate Political Committees; Notice of Proposed Rulemaking (58 FR 12189, March 3, 1993)

1993-9

11 CFR Part 102: Rulemaking Petition: Citizens Against David Duke; Notice of Availability (58 FR 12189, March 3, 1993)

1993-10

Filing Dates for the Wisconsin Special Elections (58 FR 12966, March 8, 1993)

1993-11

11 CFR Part 110: Transfers of Funds from State to Federal Campaigns; Revised Implementation Plan for New Rule (58 FR 14310, March 17, 1993)

1993-12

11 CFR Part 201: Ex Parte Communications; Change in Date of Public Hearing (58 FR 14510, March 18, 1993)

1993-13

11 CFR Part 104: Recordkeeping and Reporting Requirements—Best Efforts; Change in Date of Public Hearing (58 FR 14530, March 18, 1993)

1993-14

11 CFR Part 110: Transfers of Funds from State to Federal Campaigns; Final Rule; Announcement of Effective Date (58 FR 17967, April 7, 1993)

1993-15

Filing Dates for Texas Special Runoff Election (58 FR 29413, May 20, 1993)

1993-16

Compliance Procedures: 11 CFR Parts 4, 5, 102 and 111; Notice of Proposed Rulemaking (58 FR 36764, July 8, 1993)

1993-17

11 CFR Parts 102 and 110: Multicandidate Political Committees; Final Rule; Transmittal of Regulations to Congress (58 FR 42172, August 6, 1993)

1993-18

11 CFR Parts 107, 114 and 9008: Presidential Election Campaign Fund and Federal Financing of Presidential Nominating Conventions; Notice of Proposed Rulemaking; (58 FR 43046, August 12, 1993)

1993-19

11 CFR Parts 100 and 113: Expenditures; Personal Use of Campaign Funds; Notice of Proposed Rulemaking (58 FR 45463, August 30, 1993)

1993-20

11 CFR Parts 100 and 114: Definition of "Member" of Membership Association; Final Rule; Transmittal to Congress (58 FR 45770, August 30, 1993)

1993-21

Filing Dates for Michigan Special Elections (58 FR 46642, September 2, 1993)

1993-22

11 CFR Part 8: National Voter Registration Act; Advance Notice of Proposed Rulemaking (58 FR 51132, September 30, 1993)

1993-23

11 CFR Parts 100 and 113: Personal Use of Campaign Funds; Extension of Comment Period and Notice of Hearing Request (58 FR 52040, October 6, 1993)

1993-24

11 CFR Parts 107, 114: and 9008: Federal Funding of Presidential Nominating Conventions; Notice of Public Hearing (58 FR 52700, October 12, 1993)

1993-25

11 CFR Part 104: Recordkeeping and Reporting by Political Committees: Best Efforts; Final Rule; Transmittal to Congress (58 FR 57725, October 27, 1993)

1993-26

11 CFR Part 201: Ex Parte Communications; Revised Interim Rules (58 FR 59642, November 10, 1993)

1993-27

11 CFR Chapter 1: Ratification of Regulations (58 FR 59640, November 10, 1993)

1993-28

11 CFR Parts 100 and 114: Definition of "Member" of a Membership Association; Final Rule; Announcement of Effective Date (58 FR 59641, November 10, 1993)

1993-29

11 CFR Parts 102 and 110: Multicandidate Political Committees; Final Rule; Announcement of Effective Date (58 FR 59641, November 10, 1993)

1993-30

11 CFR Part 112: Policy Statement on Advisory Opinion Precedent (58 FR 59642, November 10, 1993)

1993-31

11 CFR Part 112: Revision to Advisory Opinion Comment Procedure (58 FR 62259, November 26, 1993)

1993-32

11 CFR Parts 100 and 113: Expenditures; Personal Use of Campaign Funds; Notice of Hearing (58 FR 64190, December 6, 1993)

1993-33

11 CFR Part 102: Special Fundraising Projects and Other Use of Candidate Names by Unauthorized Committees; Notice of Proposed Rulemaking (58 FR 65559, December 15, 1993)

Appendix 7

Regulations on Definition of “Member”: Summary

New regulations specifying the voting rights and financial attachments necessary for persons to qualify as “members” of incorporated membership groups became effective on November 10, 1993. Only qualified “members” are eligible to receive PAC solicitations and partisan communications from the incorporated membership group. See 2 U.S.C. §441b(b)(2)(A) and (4)(C).

The membership rules apply to both individual and corporate members. Although a membership group may not solicit contributions from its corporate members, it may direct partisan communications to individual representatives of corporate members, and a trade association may seek PAC solicitation approval from its corporate members. 11 CFR 114.8(d) and (h).

Definition of Membership Association

A membership association is defined as a labor organization¹ or as an incorporated membership organization, trade association, cooperative or corporation without capital stock that expressly:

- Provides for members in its articles and by-laws;
 - Seeks members; and
 - Acknowledges the acceptance of membership, such as by sending membership cards to new members or including them on a membership newsletter list.
- 11 CFR 100.8(b)(4)(iv)(A) and 114.1(e)(1).

¹ As in the former rules, members of a local labor union are considered to be members of any affiliated national or international union and members of any federation affiliated with the local, national or international union. 11 CFR 100.8(b)(4)(iv)(D) and 114.1(e)(4)

Definition of Member

In addition to satisfying the association’s requirements for membership, a member must affirmatively accept the membership invitation and meet one of the following three conditions:

1. *Regular Dues/Limited Voting Rights.* The member is required to pay dues of a specific amount on a regular basis (e.g., annually or monthly) and is entitled to vote directly for: (a) at least one member who has full participatory and voting rights on the highest governing body of the association, or (b) those who select at least one such member of the highest governing body.

2. *Significant Financial Attachment.* The member has some significant financial attachment to the membership association, such as a significant investment or ownership stake, but not merely the payment of dues.

3. *Full Voting Rights.* The member is entitled to vote directly for all of those on the highest governing body of the membership association. 11 CFR 100.8(b)(4)(iv)(B) and 114.1(e)(2).

The Commission may consider, on a case by case basis, whether other membership arrangements would satisfy the definition of member. For example, student members who pay lower dues while in school, or long-term members who qualify for lifetime memberships with no further dues obligations, may be considered members if they retain some voting rights in the association. 11 CFR 100.8(b)(4)(iv)(C) and 114.1(e)(3). An association should seek an advisory opinion for further guidance on alternative membership arrangements.

Multi-tiered Associations; Farm and Rural Electric Cooperatives

The voting rights and financial attachment criteria set forth in the definition of member govern whether three-tiered or multi-tiered associations can solicit members across all tiers. For example, in a three-tiered membership association, if members at the local level have the requisite ties to both the state and national tiers, solicitation is permissible across all

three tiers. See, for example, AOs 1992-9, 1991-24 and 1981-23.

Although members of federated farm and federated rural electric cooperatives do not have the precise financial and organizational ties required under the rules, they nevertheless have significant ties throughout all levels. The structure and organization of these cooperatives are comparable to those of federations of trade associations. Like federations of trade associations under section 114.8(g), federated farm and rural electric cooperatives are authorized to solicit and to direct partisan communications to members of their regional, state and local affiliates provided that political committees established by the affiliates are considered affiliated committees, subject to shared contribution limits. 11 CFR 114.7(k).

Appendix 8 Regulations Banning Transfers from Nonfederal Campaigns: Summary

The Commission set July 1, 1993, as the effective date of a rule prohibiting transfers of funds and assets from a candidate's nonfederal campaign to his or her federal campaign (11 CFR 110.3(d)). The new rule granted a petition for rulemaking filed by Congressman William Thomas.

Previously, the Commission's regulation at 11 CFR 110.3(c)(6) permitted a nonfederal campaign committee to transfer funds that were from permissible sources to a federal campaign committee established by the same candidate.

The prohibition on nonfederal transfers did not apply to the campaigns of candidates running in the special elections scheduled before July 1. Those

campaigns were subject to the provisions of 11 CFR 110.3(c)(6). Under the new rule, if a federal campaign committee had received transfers of funds from the candidate's nonfederal committee, it was required to identify any nonfederal funds remaining in its account as of July 1. Any such funds had to be removed before July 31.

The Commission originally intended to set April 1 as the effective date for the new rule. However, the required legislative review period (30 legislative days) took longer than expected.¹ The Commission wanted to avoid setting an effective date in the middle of the special election activity and therefore decided on the July 1 effective date.

¹ Legislative days are those days when the House or Senate is in session. 2 U.S.C. §438(d)(3). The 30-day legislative review period expired on March 18, 1993. On April 1, the Commission approved an announcement of the July 1 effective date for publication in the Federal Register.

Appendix 9

Multicandidate Committee Regulations: Summary

In 1993 the Commission approved new regulations to make it easier to identify committees that have qualified as multicandidate committees under the Act. (Multicandidate committees may give up to \$5,000 to a candidate, per election;¹ other committees are subject to a \$1,000 per election limit.)

The new requirements for multicandidate committees took effect January 1, 1994.

Initial Disclosure of Multicandidate Status on New Form 1M

Under 11 CFR 102.2(a)(3), a newly qualified multicandidate committee must file a new form, FEC Form 1M, before it contributes over \$1,000, per election, to a candidate. The committee must disclose the following information on the form:

- The date it registered;
- The date it received a contribution from its 51st contributor;
- A list of five federal candidates it has supported;² and
- The date it achieved multicandidate committee status.

The form also makes provision for new committees that automatically qualify as multicandidate committees on the date of registration by virtue of their affiliation with an existing multicandidate committee.

Continual Reporting of Multicandidate Status on Amended Form 3X

In another reporting change, the multicandidate checkoff box on Form 3X (line 3) has been amended. Committees that have qualified as multicandidate committees must now check the box on every report they file. Previously, committees checked the box only once, on the first report filed after achieving multicandidate status.

The amended Form 3X will allow candidates and other interested parties to determine a committee's status at a glance.

Multicandidate Committee Notice to Candidates

Under a second new provision, 11 CFR 110.2(a)(2), when making contributions to candidate committees, multicandidate committees are required to provide written notice of their multicandidate status to the recipient. In the explanation and justification accompanying the regulations, the Commission suggested that committees display the information on their checks or letterhead. The information may also be included in the body of an accompanying letter or other communication.

¹ Note that the conditions for qualifying as a multicandidate committee remain the same: Registration for at least 6 months, contributions from more than 50 persons and contributions to at least 5 candidates for federal office. (The last requirement does not apply to state party committees.)

² This does not apply to state party committees.

Appendix 10

Revised Interim Rules on Ex Parte Communications: Summary

On October 28, 1993, the Commission adopted revised interim rules on ex parte communications that reflect public comments and testimony, and its own experience with the previous rules. (Ex parte communications are written and oral communications made by persons outside the agency to Commissioners or their staff concerning substantive Commission action.) The revised rules, which took effect November 10, replace those adopted in December 1992.

The amended rules extend the ban on ex parte communications regarding audits and litigation to those concerning public funding. (Ex parte communications pertaining to enforcement actions are subject to a separate prohibition. 11 CFR 7.15 and 111.22.) Commissioners and their staff must attempt to prevent these communications. If, however, they do receive a prohibited communication, they must:

- Advise the person making the communication that it will not be considered; and
- Submit to the Designated Agency Ethics Official a statement describing the substance and circumstances of the communication. That submission must occur within three business days or prior to the agency's next consideration of the matter, whichever occurs first. The statement becomes part of the file related to the pertinent audit, court case or public funding decision.

Ex parte communications related to rulemaking proceedings and advisory opinions continue to be permitted, but the recipient Commissioner or staff member must disclose the contact within three business days or prior to the Commission's next consideration of the matter, whichever occurs first. Such communications become part of the public record.

The ex parte rules do not apply to discussions involving the procedural status of an open matter or to statements made in a public forum.

The revised regulations include the possibility of sanctions for violations of the rules. In response to a written complaint, the Designated Agency Ethics Official would recommend to the Commission an appropriate action. The Commission would consider the recommendation and decide what action to take by a vote of at least four Commissioners.

Only communications made to Commissioners and members of their staff are governed by the revised rules. The Commission planned to consider an internal agency directive to address outgoing communications.

The Commission adopted the revised rules on an interim basis and may reevaluate them further before issuing final rules.

Appendix 11

“Best Efforts” Regulations: Summary

Political committees and their treasurers must exercise “best efforts” to obtain, maintain and report the identification¹ of individuals who contribute more than \$200 in a calendar year. If they fail to disclose contributor information, but can demonstrate that they made “best efforts” to obtain it, they will be in compliance with the law. 11 CFR 104.7. On October 21, the Commission revised its rules to clarify the steps that must be taken to demonstrate “best efforts”:

1. Requesting contributor information in the initial solicitation;
2. Making a follow-up request (if necessary);
3. Reporting the information; and
4. Filing amendments to disclose previously unreported information.

The new rules and their explanation and justification were published in the Federal Register on October 27 (58 FR 57725).²

Solicitations

Under the new rules, committees must include in each solicitation a clear and conspicuous request for the identification of contributors who give more than \$200 per calendar year. That request must contain the following statement:

Federal law requires political committees to report the name, mailing address, occupation and name of employer for each individual whose contributions aggregate in excess of \$200 in a calendar year.

The request will not be considered “clear and conspicuous” if it is illegible or smaller than the text of the solicitation and response materials or if it is placed where it may be easily overlooked.

Follow-up Request

If a committee receives a contribution that exceeds the \$200 threshold but lacks contributor identification, the treasurer must—within 30 days—make an additional written or oral request for the information. That request may not include an additional solicitation or material on any other subject. It may, however, thank the contributor for his/her donation. Written requests must include a pre-addressed return post card or envelope for the contributor’s response. The follow-up request must be made for any solicited or unsolicited contribution exceeding the threshold that lacks the necessary information.

Reporting

Committees must, of course, disclose on their FEC reports the information provided by each contributor. Under the new rules, committee treasurers must also disclose information that was not provided by the contributor, but is available in the committee’s records for that two-year election cycle, including its contributor records, fundraising records and previous reports.

Filing Amendments

If a committee receives contributor information after the contributions have been reported, the committee must either:

- Submit with its next report a memo Schedule A listing all the contributions for which additional information was received during that reporting period; or
- File, on or before the next reporting date, amendments to the previous reports on which the contributions were originally disclosed.

Under either option, committees should cross reference the new information to the specific reports and entries that are being amended. Committees need only amend the information pertaining to contributions received during the current two-year election cycle.

¹“Identification” means the name, mailing address, occupation and employer of an individual. 11 CFR 100.12.

²These regulations became effective on March 3, 1994.